

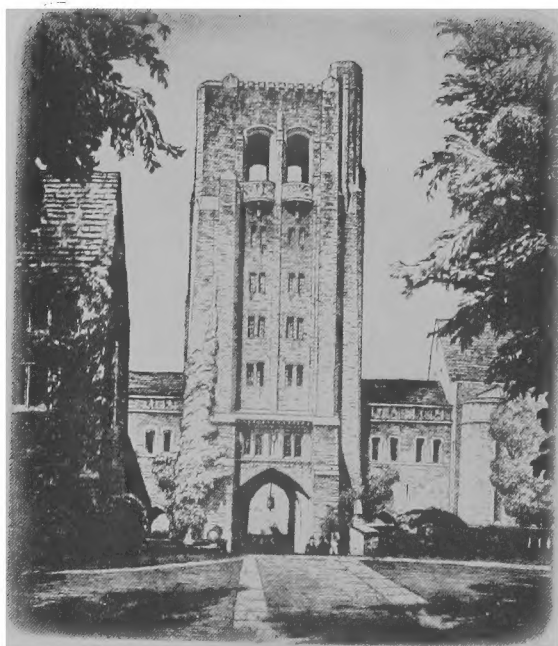
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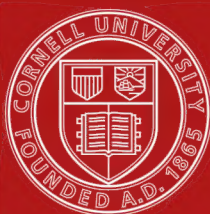
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A TREATISE

ON THE

LAW OF CONTRACTS.

BY

WILLIAM W. STORY,
COUNSELLOR AT LAW.



Obligamur aut re, aut verbis, aut simul utroque, aut consensu, aut lege, aut jure honorario,
aut necessitate, aut peccato. — PANDECTÆ JUSTINIANÆ.

IN TWO VOLUMES.

VOL. I.



FOURTH EDITION, REVISED AND GREATLY ENLARGED.

BOSTON:
LITTLE, BROWN AND COMPANY.
1856.

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TO THE FOURTH EDITION.

THE last edition of this Treatise has already been exhausted for nearly a year, but in the anxious desire to merit the increased favor with which it was received by the profession, the publication of the present edition has been deferred so as to enable the author to devote that period of time to the careful revision of the text, and thereby to endeavor to render it more exact and complete. Neither time nor labor have been spared in its preparation. Every page has been studiously examined and reconsidered in the light of the modern authorities, and in many places the text has been rewritten. The portion of the work relating to Defences, for instance, is almost entirely new, and is more than doubled in size, as well, it is hoped, as in value. Very large additions have also been made throughout to nearly every page; and new chapters have been written on the following subjects:—Joint and Several Contracts; Change of Parties by Assignment; Change of Parties by Novation or Substitution; and The Statute of Frauds. The Reports have been carefully consulted, and a large body of important cases has been added, while nearly every citation in the book has been specially reëxamined and verified, so as

to secure, if possible, exactness in the references. It can scarcely, however, be expected that errors may not have crept in among the citations of over ten thousand cases, despite the pains that have been taken to weed them thoroughly out.

In regard to the text and notes, it may be proper to say, that the plan originally adopted has been rigidly pursued; the principles and rules of law with their modifications and illustrations being stated in the text, and the cases and authorities being confined to the foot-notes. The text itself has not been enlarged by quotations from judgments or encumbered by examinations of strings of cases, but all extracts and discussions of cases have been restricted to the notes.

The size of the page has been considerably increased in the present edition, so that the number of pages does not fairly represent the real increase of the work. But notwithstanding the compression thus gained, a division into two volumes has been found necessary. It is believed, however, that this will be found to render the work more convenient and easy of use. In its present form it has swollen to more than three times its original bulk, but nothing has been added for the sake of mere amplification, and every endeavor has been used to be close and compact, as well as full. It is now the largest work, in the English language at least, on the subject of Contracts. The well-deserved success of Professor Parsons's recent and valuable work, on the same subject, has stimulated the author of the present work in his labor, and encouraged him to believe, that the profession will not object to the increased size, nor the division into two volumes.

W. W. STORY.

BOSTON, May 18, 1856.

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TO THE THIRD EDITION.

A NEW edition of this treatise having been called for, the author has taken occasion thoroughly to revise the text and substantially to enlarge it. Many additions have been made to it throughout, but particularly to the chapters on Sales, Bailments, and Defences ; — one new chapter has been introduced on the Relation of Master and Servant ; — and all the late cases bearing upon the general subjects have been examined and cited.

In these additions, which have enlarged the work by about three hundred pages, the author has striven to avoid mere amplification. The subject of Contracts is so large, (being, as it were, one wing of the law, the other of which is *tort*,) that it is difficult to determine the proper limits of a treatise like the present. Any line of limitation must, of necessity, be arbitrary. But it is hoped that the present edition will be found to be materially increased in usefulness, and more worthy of the favor bestowed upon the work by the profession.

W. W. STORY.

CAMBRIDGE, May 16, 1851.

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TO THE SECOND EDITION.

IN preparing the present edition for the press, the text has been thoroughly revised, and large additions have been made thereto as well as to the notes. The doctrines originally stated have been expanded and pursued into their minuter ramifications, and the late cases, by which they are modified or illustrated, have been cited. Many new branches of the subject of Contracts have been introduced, which were not treated of in the former edition, among which may be mentioned the law relating to Usury, and to the contracts of Factors, Brokers, Auctioneers, Executors and Administrators, Trustees, Seamen, Corporations, Guardian and Ward, and Masters of Ships. These additions (by which the bulk of the original work is nearly doubled) will, it is hoped, be thought to give to the Treatise more completeness, and to render it more valuable to the profession. No labor has been spared in the endeavor to be concise as well as full, and not to encumber and confuse the subject by amplifying it.

It will be perceived that a change has been made in the arrangement of the subjects. The doctrines relating to Part-

ners and Agents, which were before treated separately in the second part, as Special Contracts, are now placed under the head of Parties, and form a portion of the first part. This alteration was made with the belief that it gives a more logical development to the subject. In consequence of this fact as well as of the great enlargement of the work, it became necessary to number the sections anew. But if it be borne in mind that the sections, in which the law relating to Agents and Partners is considered, followed, in the first edition, the chapter "On the Admissibility of Parol Evidence to control written agreements," it is believed that no difficulty will be found to arise from the new numbering.

The kind reception given by the public and the profession to the previous edition of this Treatise has stimulated and encouraged the author to endeavor to render the present edition more full and complete, and it is submitted to them in the hope that it may, in its present form, be found to be better adapted to their wishes, and better deserving their approbation.

W. W. STORY.

BOSTON, August 27, 1847.

P R E F A C E .

THE present work is intended, primarily, as a text-book for students, but it is by no means restricted in its scope or design to such a use. Its purpose is not only to sketch an elementary outline of the law relating to simple contracts, but to elucidate and systematize, as far as practicable, the general law applicable to the subject; in the hope that it may serve alike the student and the practitioner. It is believed, that such a work is now needed by the profession, for new circumstances and exigencies so modify and expand every department of jurisprudence, as to require new expositions of the law, however valuable preceding treatises may have been. The plan of the present work has been to render cases subordinate to principles, and, instead of pursuing the common method of merely digesting the various authorities, to throw the main body of them into the notes, and to incorporate those only in the text, which seemed to afford the best illustrations of the doctrine under consideration.

The author acknowledges himself to be indebted for

real and valuable assistance to the Commentaries of Mr. Chancellor Kent, and to the labors of Mr. Metcalf. The lectures of the former contain many admirable sketches on the subject of Contracts, which are characterized by the comprehensive learning and ability of that distinguished jurist. But they do not profess to be more than a general sketch of the law appertaining to Contracts, and they still leave a large field unoccupied. So, also, the articles upon Contracts by Mr. Metcalf, which were published in the *American Jurist*, are distinguished by nice discrimination, and lucid arrangement, and, had they been completed, would have rendered the present work unnecessary. And here I may, also, be permitted gratefully and affectionately to acknowledge the valuable aid which I have derived from the Commentaries of my father, Mr. Justice Story, — an aid which it is my pride as well as my pleasure to receive ; they have materially abridged my labors, and, in many instances, rendered further investigation unnecessary.

With the most unfeigned diffidence, this treatise is now submitted to the profession, with the wish, that it may aid their researches, and with the hope, that they will not “measure by the scale of perfection, the meagre product of reality.”

BOSTON, June 17, 1844.

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PART I.

CONTRACTS NOT UNDER SEAL.

CONTRACTS NOT UNDER SEAL.

CHAPTER I.

DIFFERENT KINDS OF CONTRACTS.

§ 1. A CONTRACT is a deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing, some act. In its widest sense it includes records and specialties, but the term is usually employed to designate only simple or parol contracts. By parol contracts, is to be understood, not only verbal and unwritten contracts, but all contracts not of record nor under seal. This is strictly the legal signification of the term contract, inasmuch as that reciprocity of consideration, and mutuality of agreement, which are necessary to constitute a parol agreement, are not requisite in obligations of record and in specialties.¹

¹ Chitty on Cont. (5th Am. ed.) 20. Chief Justice Marshall, in *Sturgis v. Crowninshield*, (4 Wheat. 196,) defines a contract to be "an agreement in which a party undertakes to do or not to do a particular thing." This definition is intended to embrace all kinds of contracts, whether by record, specialty, or parol, and therefore omits the consideration. It seems impossible, however, to classify these three species of obligation under the generic term contract, since, as every definition must either state or omit the consideration, it must necessarily be incomplete as to the one or the other class. Blackstone's definition, "an agreement, upon sufficient consideration, to do or not to do a particular thing," (2 Black. Comm. 446,) seems better in this particular, inasmuch as a

§ 2. Contracts are divided into three classes. 1st. Contracts of Record, such as judgments, recognizances, and statutes staple. 2d. Specialties, which are contracts under seal,—such as deeds and bonds. 3d. Simple Contracts, or contracts by parol. There is no such fourth class as contracts in writing, distinct from verbal and sealed contracts; both verbal and written contracts are included in the class of simple contracts, and the only distinction between them, is in regard to the mode of proof.¹

§ 3. The first two classes of contract, we do not in the present treatise propose to discuss, but shall confine ourselves to the consideration of the principles applicable to simple contracts. It may be well, however, here to state, the various particulars in which simple or parol contracts are distinguished from specialties, or contracts under seal.

deed may be considered as importing a consideration, although it be unnecessary to express it on the face of the instrument, and although both parties be estopped to deny it. Yet even this definition omits all mention of the competency of the parties, and of that deliberate assent of the understanding which is requisite to the validity of every contract, and therefore it seems imperfect. A contract is defined, by an able writer in the *Law Magazine*, as “a mutual engagement voluntarily and deliberately entered into between two persons, at least, to do something beneficial to each other.” (1 *Law Mag.* 531.) Chitty, in his work on Contracts, gives a fuller and more elaborate definition, but it only includes parol contracts, and might rather be called a description than a definition. “A contract not under seal,” he says, “is the mutual assent of two or more persons, competent to contract, founded on a sufficient and legal motive, inducement, or consideration, to perform some legal act, or omit to do any thing, the performance of which is not enjoined by law.” (Chitty on Cont. 7.) Upon the whole, Blackstone’s seems to approach nearest to a correct definition. The term obligation, which includes every legal tie, as distinguished from imperfect obligations, such as affection and gratitude, and natural obligations, which afford no legal remedy, would seem the better generic term, comprehending the different species of record, specialty, and parol contract. Custom has, however, affixed to all species of legal obligation the term contract. See 20 *Am. Jur.* 1.

¹ *Rann v. Hughes*, cited in the note to 7 T. R. 350; *Ballard v. Walker*, 3 Johns. Cas. 65; *Perrine v. Cheeseman*, 6 Halsted, R. 174; *People v. Shall*, 9 Cow. 778; *Thatcher v. Dinsmore*, 5 Mass. 301. See post, § 10, note.

§ 4. In the first place, specialties do not require a consideration to render them obligatory at law; while the consideration is the very life of a parol agreement.

§ 5. In the second place, specialties must be sealed and delivered; but a mutual understanding and assent are alone necessary to complete a parol contract.

§ 6. In the third place, the technical doctrine of estoppel obtains in respect to specialties. Neither party can go behind the instrument, and the recital therein of any fact precludes the right to controvert it.¹ In simple contracts, however, although an admission therein of a fact affords evidence of its truth, it may be disproved, and evidence may be given to controvert it.²

§ 7. In the fourth place, in case of the death of either party to a specialty, the remedy by the ancient common law survives against the heir, if mentioned therein, and by statute against the devisee, and affects the realty;³ but the remedy on a parol contract extends only to the personal property of the contractor, and is binding only upon his personal representatives, namely, his executors and administrators.

§ 8. At the common law, also, a specialty debt is entitled to a priority over a simple contract debt in the payment of

¹ 2 Blackstone's Comm. 295; Comyn's Dig. Estoppel A.; Taylor v. Clow, 1 Barn. & Ad. 223; Lainson v. Trencere, 1 Adolph. & Ell. 792; Doe v. Ford, 3 Adolph. & Ell. 649; Doe, dem. Preece v. Howells, 2 Barn. & Adolph. 744; Bowman v. Taylor, 2 Adolph. & Ell. 278; Hayne v. Maltby, 3 T. R. 438; Cox v. Cannon, 4 Bing. N. C. 453; s. c. 6 Scott, 347; 6 Dowl. 625; Doe & Levy v. Horne, 32 B. 760; Carter v. James, 13 Mees. & Welsb. 137; Beckett v. Bradley, 8 Scott, N. R. 843; Carpenter v. Buller, 8 Mees. & Welsb. 209.

² Parish v. Stone, 14 Pick. 201, 202.

³ Bac. Abr. Heir, F. 1, Ancestor, F.; 2 Black. Comm. 243; Jefferson v. Morton, 2 Wms.'s Saunders, 6, n. 4, 8 a.; Farley v. Briant, 3 Ad. & Ell. 389.

the debts of a testator or intestate,¹ although in many of the American States, the rule is altered by statute.

§ 9. In the fifth place, a deed must be declared upon specially, and profert must be made, and the defendant is entitled to oyer thereof.² But there is neither profert nor oyer in the pleadings on a simple contract.

§ 10. A parol contract, then, is any contract not of record, nor under seal, whether it be written or verbal. Certainty, and facility of proof, are all the advantages gained by reducing such an agreement to writing; the liabilities of the respective parties are not changed.³

EXPRESS AND IMPLIED CONTRACTS.

§ 11. Every contract is founded upon the mutual agreement of the parties; and that agreement may either be formally stated in words, or committed to writing, or it may be a legal inference, drawn from the circumstances of the case, in order to explain the situation, conduct, and relations of the parties. When the agreement is formal, and stated either verbally or in writing, it is usually called an *express contract*. When the agreement is matter of inference and deduction, it is called an *implied contract*. Both species of contract, are, however, equally

¹ 2 Black. Comm. 465.

² 1 Chitty, Plead. (6th ed.) 397.

³ Skynner, C. B., in delivering the opinion of the court, in *Rann v. Hughes*, cited in the note to 7 T. R. 350, says, "All contracts are, by the law of England, distinguished into agreements by specialty and agreements by parol, nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved." See, however, *Stackpole v. Arnold*, 11 Mass. 30, where the late Chief Justice Parker says, "There are three classes of contracts, namely: specialties, written contracts not under seal, and parol or verbal contracts." This classification, however, was only employed in relation to the particular point before the court, and does not agree with the established authorities. *Cooke v. Bradley*, 7 Conn. 57; *People v. Shall*, 9 Cow. 778; *Barnet v. Bisco*, 4 Johns. R. 235; *Thatcher v. Dinsmore*, 5 Mass. 301; *Brown v. Adam*, 1 Stew. 51. See 20 Am. Jur. 4.

founded upon the actual agreement of the parties, and the only distinction between them is in regard to the mode of proof, and belongs to the law of evidence. In an implied contract, the law only supplies that which, although not stated, must be presumed to have been the agreement intended by the parties.¹

§ 12. The law always presumes such agreements to have been made, as justice and reason would dictate, and assists the parties to any transaction, in an honest explanation of it.² But a promise will not be implied, contravening the express declarations of the party charged, made at the time of the supposed agreement,³ unless such declarations be at variance with some legal duty, and then the law will imply a promise to perform that duty; as where a husband wrongfully expels his wife or minor child from his house, and declares that he will not be responsible for articles furnished to them, the law sets his declaration at naught, and compels him to pay for necessities furnished to them.⁴ Wherever a party avails himself of the benefit of services done for him, although without his positive authority or request, the law supplies the formal words of contract and presumes him to have promised an adequate compensation;⁵ as where a person buys an article without stipulating for the price, he is presumed to have undertaken to

¹ 2 Black. Comm. 443. In the Roman law, implied contracts are entitled, "*Obligaciones quasi ex contractu.*" Church v. The Imperial Gas Light Co. 6 Adolph. & Ell. 859.

² Chief Justice Marshall, in Ogden v. Saunders, 12 Wheaton, 341, says, "A great mass of human transactions depend upon implied contracts, which are not written, but grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations, which as honest, fair, and just men, they ought to have made."

³ Whiting v. Sullivan, 7 Mass. 107; Worthen v. Stevens, 4 Mass. 448; 3 Starkie, Ev. 1763; Selway v. Fogg, 5 Mees. & Welsb. 83.

⁴ Robinson v. Gosnold, 6 Mod. 171; Harris v. Morris, 4 Esp. 42; 2 Kent, Comm. 125, 126; Thompson v. Hervey, 4 Burr. 2178; Angel v. McLellan, 16 Mass. 31; Van Valkenburg v. Watson, 13 Johns. R. 480.

⁵ Abbot v. Hermon, 7 Greenl. 118; Brackett v. Norton, 4 Conn. 524.

pay its market value; or where he allows another to do any work or make any article for him, he impliedly binds himself to pay what it is worth; or where he holds the money of another as trustee or bailee, the law supposes a promise to restore it. So, also, where a person engages to do any work or perform any service, he is understood to engage that he has sufficient skill and ability to fulfil his contract,¹ and, also, that he will use all the means necessary to accomplish it.² So, also, if a party of friends meet to dine at a tavern, and give a joint order for dinner, and after dinner all but the plaintiff depart without paying, and the plaintiff pay for all, he may maintain an action against the others on an implied promise by them to pay their several proportions of the joint liability.³ So, also, each party would be responsible to the innkeeper on an implied promise to pay the reckoning, unless it were known that all were *guests* of one, — in which case as credit would have been given but to the inviter, he alone would be liable.⁴

§ 12 *a*. So, also, if a man having a title to certain property silently permit another to deal with that property as his own, in all transactions between such person and others, acting in the confidence that the property belonged to him, the true owner would be bound. Thus, if a man stand by and knowingly see his own property sold, and either encourage the sale, or do not forbid it, the law implies a contract between him and the vendee, and accredits the actual seller as his agent; and this rule obtains on the clear ground, that if one of two innocent persons must suffer a loss, and *a fortiori*, where one has misled the other, he who has been the cause of the loss ought to bear it.⁵ But in all cases, the circumstances must be such

¹ See Post, § 737, § 973, and cases cited.

² *Savage v. Whitaker*, 3 Shep. R. 24.

³ Per Lord Kenyon, 8 Dowl. & Ryl. 614; *Forster v. Taylor*, 3 Camp. R. 49.

⁴ Rolle's Abr. 24, 31.

⁵ *Teasdale v. Teasdale*, Sel. Cas. Ch. 59; 1 Story, Eq. Jurisp. § 385; *Storrs v. Barker*, 6 Johns. Ch. R. 166, 169; *Wendell v. Van Rensselaer*, 1 Johns. Ch. R. 354; *Heane v. Rogers*, 9 Barn. & Cres. 586; *Graves v. Key*, 3 Barn.

as unequivocally to imply a contract between the parties, and evidence may be given to rebut such a presumption.

§ 13. Nor is this rule restricted to cases where the true owner of property knowingly permits another to make sale of it, without interference or objection, but it extends also to cases where a party, being ignorant that he has any title, does or says any thing in the premises, which actually misleads the purchaser to his injury; for however innocent he may be of a fraudulent intent, he ought to suffer the consequences of his own act, whenever loss or injury must accrue to one or other party. Yet if his mistake would not occasion absolute injury, or did not operate to deceive, he will not be bound thereby.¹

§ 13 *a*. So, also, the mere silence of a person may create an implied liability, where it was his duty to speak in case he intended not to assume a personal responsibility, and especially where his silence afforded a material inducement to the contract. Thus, where A., wishing to buy a harness, invited C. to accompany him to a harness-maker, and there induced the harness-maker to sell him the harness on credit, by an assurance, in C.'s presence, that if he did not pay, C. would, — and A. having made default, C. paid the money and brought his action against A. to recover the amount paid, — it was held that as C. stood by and tacitly assented to A.'s promise of payment, he must be taken to have given him an express authority; and C. having acted thereon, the law would imply a promise from A. to repay the money.²

& Adol. 318, note *a*; *Pickard v. Sears*, 6 Adol. & Ell. 474. See Post, § 407 to § 426, § 506 to § 523; *Nicholson v. Hooper*, 4 Myl. & Craig, 179.

¹ 1 Story's Eq. Jurisp. § 386, 387, 388; 2 Hovenden on Frauds, ch. 22, p. 184; *Hobbs v. Norton*, 1 Vern. R. 136; *Hudson v. Cheyney*, 2 Vern. R. 150; *Storrs v. Barker*, 6 Johns. Ch. R. 166; *Neville v. Wilkinson*, 1 Bro. Ch. R. 546, 1 P. Wms. 74, and Mr. Cox's note; *Scott v. Scott*, 1 Cox, R. 378; *Evans v. Bucknell*, 6 Ves. R. 173; *Pearson v. Morgan*, 2 Bro. Ch. R. 388.

² *Alexander v. Vane*, 1 Mees. & Welsb. 511.

§ 13 *b*. So, also, although a merely voluntary and unauthorized payment of the debt of a third person ordinarily raises no implied promise on the part of such person to repay it, yet there are certain cases, where the debt was legally obligatory, and the payment was by compulsion of law, in which the law will import a request from the original debtor and a promise of repayment.¹ Thus, where a carriage belonging to the plaintiff was sent to the defendant, a coach-maker, to be repaired, and while in his possession it was distrained by his landlord for rent due from the defendant, and the plaintiff was forced to pay the rent in order to redeem his carriage, it was held, that he might reclaim the money so paid in an action of *assumpsit* against the defendant.² The same rule was held in a case where a subtenant was forced under a threat of distress to pay a ground-rent to the original lessor, which was due to his immediate landlord.³ And where an executor paid a legacy in full, having inadvertently omitted to deduct the legacy duty required by act of parliament, it was held that the legatee was responsible therefor.⁴

§ 13 *c*. *A fortiori*, where there is a special privity of contract, as in the case of sureties, or joint and several debtors, or indorsers and acceptors of a negotiable security, a payment by one raises an implied promise of contribution by the others,⁵

¹ *Exall v. Partridge*, 8 T. R. 308; *Sapsford v. Fletcher*, 4 T. R. 512; *Fisher v. Fellows*, 5 Esp. R. 171; *Hales v. Truman*, 4 Moore, R. 21; *Foster v. Ley*, 2 Bing. N. S. 269; *Sutton v. Tatham*, 10 Adolph. & Ell. 27; *Brown v. Hodgson*, 4 Taunt. R. 189; *Longchamp v. Kenney*, 1 Doug. R. 137.

² *Exall v. Partridge*, 8 T. R. 308.

³ *Sapsford v. Fletcher*, 4 T. R. 512.

⁴ *Hales v. Truman*, 4 Moore, R. 21.

⁵ *Fisher v. Fellows*, 5 Esp. N. P. C. 171; *Exall v. Partridge*, 8 T. R. 308. In this case Lord Kenyon says, "Some propositions have been stated to which I cannot assent. It has been said, that where one person is benefited by the payment of money by another, the law raises an *assumpsit* against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor, *nolens volens*." . . . "I admit that where one person is surety for

unless the sum paid is only the share of the person paying.¹

§ 14. Whenever there is a uniform *usage*² in a particular trade, the parties are presumed to have contracted in reference thereto, unless it be expressly excluded by them, or unless it be inconsistent with the actual terms of their agreement.³ It must, however, be a general usage, or an universal custom, which is brought home to the knowledge of the party defendant, or it must be the special course or habit of dealing of one of the parties, recognized and assented to by the other, or no such presumption will arise.⁴ In such cases, the usage is understood to form a portion of the contract, and to exclude a rule of law inconsistent with it. Thus, an established usage in the Bridgeport Bank not to send packages of money or checks to New York, by the mail, but by the captain of the steamboat, once a week, of which usage the party giving the check was informed, was held to be sufficient evidence of an agreement between the parties not to insist on the usual rule of law regarding the transmission of checks.⁵ In

another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal." See also *Kemp v. Finden*, 12 Mees. & Welsb. 421; *Prior v. Henbrow*, 8 Mees. & Welsb. 873.

¹ *Geopel v. Swinden*, 13 Law Journal, U. S. 113; *Edge v. Knapp*, 7 Scott, N. R. 707; *Holmes v. Williamson*, 6 Maule & Selw. 158.

² In respect to the effect of Usage in modifying a contract, see Post, § 649 to § 653, § 674.

³ *Lewis v. Marshall*, 8 Scott, N. R. 846; *Spicer v. Cooper*, Q. B. 424; *Sweet v. Lee*, 3 Mann. & Grang. 466; *Trueman v. Loder*, 11 Adolph. & Ell. 496; *Blackett v. R. E. Ins. Co.* 2 Tyrw. 266; *The Bridgeport Bank v. Dyer*, 19 Conn. R. 140.

⁴ *Wood v. Wood*, 1 Car. & Payne, 59; *Moore v. Voughton*, 1 Stark. R. 487; *Scott v. Irving*, 1 Barn. & Adol. 605; *Chitty on Cont.* 20; *Stewart v. Aberdeen*, 4 Mees. & Welsb. 211; *The Reeside*, 2 Sumner, R. 569; *Macomber v. Parker*, 13 Pick. R. 182; *Sewall v. Gibbs*, 1 Hall, R. 612.

⁵ *The Bridgeport Bank v. Dyer*, 19 Conn. R. 137. See also *Bodfish v. Fox*, 23 Maine, (10 Shepley) R. 90. See Post, § 653 to § 674.

case a general usage is set up as modifying a contract, it must be proved to exist by instances, and cannot be supported by evidence of opinion merely.¹ But whenever a particular course of dealing has been uniformly adopted between two parties, any contract made between them will be presumed to be made on the basis of such usage.² Thus, if in a particular branch of trade it be a uniform usage to sell upon a certain credit, a contract of sale, in which nothing is said as to the terms of payment, will be supposed to be made upon such credit.³

§ 15. These promises of law, however, only supply omissions, and do not alter express stipulations. The general rule is, that a contract will be implied only when there is no express contract, "*expressum facit cessare tacitum*."⁴ If, therefore, there be an express contract between the parties, the plaintiff, in an action to recover the consideration for work and labor done, or for money paid, must declare specially thereupon; and so long as that contract remains unrescinded, he cannot recover the value of his services upon a *quantum meruit*.⁵ Yet if the special contract be wholly abandoned, or its terms be varied by the mutual consent of the parties, the law implies a new promise.⁶ Thus, if work additional to that contemplated in the original contract, be done at the request of the party benefited by it, he will be liable therefor, upon an implied

¹ *Cunningham v. Fonblanque*, 6 Car. & Payne, 44; *Hall v. Benson*, 7 Car. & Payne, 911.

² *Bruce v. Hunter*, 3 Camp. 467; *Eaton v. Bell*, 5 Barn. & Ald. 34; *Chitty on Cont.* 22; Post, § 649 to § 652.

³ *Swancot v. Westgarth*, 4 East, R. 74; *Gordon v. Swan*, 2 Camp. R. 429, n.

⁴ *Starke v. Cheeseman*, Lord Raym. 538; *Toussaint v. Martinant*, 2 Term R. 105; *Whiting v. Sullivan*, 7 Mass. 106; *Cutter v. Powell*, 6 Term R. 320; *Cowley v. Dunlop*, 7 T. R. 568; *Cook v. Jennings*, 7 T. R. 384; *Chitty on Cont.* 25; *Trask v. Duval*, 4 Wash. C. C. R. 185; *Moorson v. Kymner*, 2 Maule & Selw. 316; *Standen v. Christmas*, 10 Adolph. & Ell. N. S. 135.

⁵ *Rees v. Lincs*, 8 Car. & Payne, 126; *Selway v. Fogg*, 5 Mees. & Welsb. 83; *Smith v. Smith*, 1 Sandford, Sup'r Ct. R. 206.

⁶ *Goodrich v. Lafflin*, 1 Pick. 57; *Hill v. Green*, 4 Pick. 114; 20 Am. Jur. 8.

promise to pay for it.¹ So, also, where either party to an express contract is injured, or the labor or expense sustained by him in doing the work is enhanced by the neglect or omission of the other, an implied promise of indemnity therefor will arise, additional to the express agreement.² So, also, if entire performance, according to the express agreement, be rendered impossible through the fault of either party, the party in fault will be liable on a *quantum meruit*, or other action on the case, the compensation being graduated as far as possible by the terms of the express contract.

§ 16. Again, if in a written contract the words of recital or reference manifest a clear intention, that the parties shall do certain acts not expressly stipulated, the courts have therefrom inferred a covenant to do such acts, and have sustained actions of covenant for their non-performance, in like manner as if the instrument had contained express covenants to perform them.³ But where parties have made an express agreement to perform certain acts, it is not to be extended by implication, so as to embrace all other unstipulated acts, which may be either convenient or necessary to the perfect performance of their express covenants; for it may very naturally happen, and indeed such is the presumption, that, having expressed some, they have expressed all the conditions by which they intended to be bound, and that what is omitted forms as much a part of the intention as what is stipulated.⁴ Thus, where the plaintiff, by a written

¹ *Lovelock v. King*, 1 Mood. & Rob. 60; *Dubois v. Del. & Hud. Can. Co.* 12 Wend. 334; *Damon v. Granby*, 2 Pick. 345; *Hoadley v. McLaine*, 4 Man. & Scott, 340; *Smith v. Smith*, 1 Sandford, S. C. R. 206.

² *Lovelock v. King*, 1 Mood. & Rob. 60; *Dubois v. Del. & Hud. Can. Co.* 12 Wend. 334; *Damon v. Granby*, 2 Pick. 345; *Hoadley v. McLaine*, 4 Man. & Scott, 340.

³ *Aspdin v. Austin*, 5 Adolph. & Ell. 684; *Sampson v. Easterby*, 9 Barn. & Cres. 505; s. c. 6 Bing. 644; *Saltoun v. Houstoun*, 1 Bing. 433; *Duke of St. Albans v. Ellis*, 16 East, R. 352; *Earl of Shrewsbury v. Gould*, 2 Barn. & Ald. 487.

⁴ *Aspdin v. Austin*, 5 Adol. & Ell. 684; *Dunn v. Sayles*, 5 Adol. & Ell. 685; *Pilkington v. Scott*, 15 Mees. & Welsb. 657.

contract, agreed with the defendant to manufacture for the latter a certain quantity of cement, for which the latter agreed to pay him four pounds weekly during the two years following the date of the agreement, and five pounds weekly during the subsequent year, after which the defendant agreed to receive the plaintiff into partnership; and each party bound himself in a penal sum to fulfil the engagement, it was held, that the stipulation in the agreement did not raise an implied covenant that the defendant should continue the business and should employ the plaintiff therein during two or three years, but only, that he would pay weekly sums for three years to the plaintiff, on condition of his performing certain duties, and that so long as the plaintiff was ready and willing to perform them, he was entitled to recover such wages.¹

§ 16 *a*. But when the terms of a written contract are incomplete, so as to work an injury to one of the parties, if strictly construed, the law will imply such stipulations as would be necessary to carry into effect the manifest intentions of the parties, and the essential objects of the contract. Thus, if a workman contract to work for his employers for a period of twelve months, with a stipulation that he will work for no one else during that time, and in consideration of his good and faithful services, his employers agree to pay him such wages as the articles he makes shall be worth, at the usual prices for similar work—the law will imply a stipulation to find reasonable work and employ the workman during such time.²

§ 17. Yet if there be a failure of consideration to support the express contract, or if it be determined by the occurrence of some event provided for in its terms, then an implied undertaking may be raised. So, if the express promise be merely

¹ *Aspdin v. Austin*, 5 Adolph. & Ell. 671. But see *Regina v. Welch*, 20 Eng. Law & Eq. R. 82; *Emmens v. Elderton*, 26 Ibid. 20. See Post § 962 *o*, § 962 *t*.

² *Regina v. Welch*, 20 Eng. Law & Eq. R. 82; *Pilkington v. Scott*, 15 Mees. & Welsb. 657. But see *Emmens v. Elderton*, 6 C. B. 160, 176; s. c. 26 Eng. Law & Eq. R. 20.

coextensive with the implied contract, an action upon either will be sustained.¹ Thus, an action for money had and received, will lie upon a promissory note or bill of exchange, and a declaration on the special agreement is unnecessary.² So, where the illegality of consideration invalidates an express agreement to pay a just debt, antecedently due, a promise will be implied to pay the debt founded upon the original consideration. Thus, where an agreement was made, by which an attorney was to receive for his services ten per cent. upon the sum recovered, although the agreement was void from champerty, it was held, that he might recover, upon a *quantum meruit*, for his services up to the time when the agreement was entered into.³ But if an express contract be avoided on account of fraud, no contract will be implied in contradiction thereof, because no person can be presumed to have made an implied promise, at variance with his express agreement.⁴ If, therefore, money have been advanced or goods parted with upon a fraudulent contract, the plaintiff should treat it as a nullity, and bring an action of trover to recover the money or the goods, or an action for money had and received to recover the money. For, by bringing an action of *assumpsit* on the contract, he affirms it, and destroys the very ground for recovery.⁵

EXECUTED AND EXECUTORY CONTRACTS.

§ 18. Contracts are also distinguished into *executed* and *executory* contracts. An executed contract is one in which

¹ *Gibbs v. Bryant*, 1 Pick. 119; *Cornwall v. Gould*, 4 Pick. 444; *Gordon v. Martin*, Fitz-Gib. 303; *Grey v. Gower*, 2 Marsh. 275; *Bank of Columbia v. Patterson's Adm'rs*, 7 Cranch, 299.

² *Gibbs v. Bryant*, 1 Pick. 121; *Goodrich v. Laffin*, 1 Pick. 57; *Linningdale v. Livingston*, 10 Johns. R. 36.

³ *Thurston v. Percival*, 1 Pick. 4, 15.

⁴ *Selway v. Fogg*, 5 Mees. & Welsb. 83; *Ferguson v. Carrington*, 9 Barn. & Cresw. 59; *Campbell v. Fleming*, 1 Adolph. & Ellis, 40.

⁵ *Ferguson v. Carrington*, 9 Barn. & Cresw. 59; *Campbell v. Fleming*, 1 Adolph. & Ell. 40; Story on Agency, § 259, note (2), 2d edition.

nothing remains to be done by either party, and where the transaction is completed at the moment that the agreement is made, — as where an article is sold, and delivered, and payment therefor is made on the spot.¹ An executory contract is a contract to do some future act, — as where an agreement is made to build a house in six months, or to do an act on or before some future day, or to lend money upon a certain interest payable at a future time.² Where the contract is executory, if the agreement be that one party shall do a certain act, or acts, for the performance of which the other party shall pay a sum of money, the performance of the act is a condition precedent to the payment of the money.³

§ 19. There is also a class of contracts, partaking of the nature both of executory and of executed contracts; where a portion of a contract is entirely performed, and a portion of the consideration paid, and still another portion remains to be completed, and its equivalent consideration to be paid. Thus, for instance, where a shipwright engages to build a ship, in consideration that certain instalments of the price shall be paid at stated times during the progress of the work, — after the payment of one instalment, the contract if so far executed, that if the vessel be destroyed in the hands of the builder, the money paid cannot be reclaimed; but the contract is at the same time executory as to the remainder of the vessel, which the builder is bound to go on and complete.⁴

¹ "An executed contract is one, in which the object of the contract is performed." By Marshall, Ch. J., *Fletcher v. Peck*, 6 Cranch, 136.

² Plowden, R. 9; 2 Black. Comm. 447.

Willington v. The Inhab. of West Boylston, 4 Pick. R. 101; *Hunt v. Livmore*, 5 Pick. R. 395.

⁴ *Clarke v. Spence*, 4 Adolph. & Ell. 448; s. c. 6 Nev. & Man. 399; *Laidler v. Burlinson*, 2 Mees. & Welsb. 614 to 617; *Goode v. Langley*, 7 Barn. & Cresw. 26; *Simmons v. Swift*, 5 Barn. & Cresw. 857; *Mucklow v. Mangles*, 1 Taunt. R. 318; *Wilkinson on the Law of Shipping*, ch. 2; *Story on Sales*, § 232 to 235. See *Post*, § 739, § 740, § 741; *Reed v. Fairbanks*, 24 Eng. Law & Eq. R. 220.

§ 20. Again, a contract may be executory on one side, and executed on the other. As where an article is sold on credit and delivered to the buyer, or where wages for a certain amount of work are paid before the work is done.

ENTIRE AND DIVISIBLE CONTRACTS.

§ 21. There is also another distinction, namely, that between *entire* contracts and *divisible* contracts, which it may be well to advert to in this place, inasmuch as it modifies the rights and alters the remedies of the parties thereto. A divisible contract is a contract, the consideration of which is, by its terms, susceptible of apportionment on either side so as to correspond to the unascertained consideration on the other side : as, a contract to pay a person the worth of his services, so long as he will do certain work ; or to give a certain price for every bushel of so much corn as corresponds to a sample ; or to work, at a certain price per month, for an indefinite number of months.¹ The criterion of a divisible contract is, that the extent of the consideration on either side, is indeterminate until the contract is performed. Neither party to such a contract can claim more than an equivalent for the actual consideration on his part. No specified entirety of consideration on either side constitutes a condition of the bargain, but only a certain relation and proportion between the considerations on both sides, to be ascertained on the completion of the contract. Thus, in the instances just stated, there is no total quantity of work, and no exact number of bushels of corn, and no total price specified, but the price is to be adjusted so as to become an equivalent for the labor or the corn, after the contract is performed. The workman might, therefore, leave off his work at any time and claim the worth of his services, because the payment therefor is not conditioned on a performance of the whole amount of work to be done. If, therefore, money be advanced on a divis-

¹ *Nichols v. Coolahan*, 10 Metcalf, R. 449.

ible contract, in contemplation of an executory consideration, which subsequently fails in part, the excess above the value of the consideration actually performed may be recovered.

§ 22. An entire contract is a contract, the consideration of which is entire on both sides. The entire fulfilment of the promise by either, is a condition precedent to the fulfilment of any part of the promise by the other. Whenever, therefore, there is a contract to pay a gross sum, for a certain and definite consideration, the contract is entire, and is not apportionable either at law or in equity. The principle upon which this rule is founded, seems to be, that as the contract is founded upon a consideration dependent upon the entire performance thereof, if from any cause it be not wholly performed, the *casus fœderis* does not arise, and the law will not make provision for exigencies, against which the parties have neglected to fortify themselves.¹ Thus, where an employer hired a sailor by a written contract to go a certain voyage, and do his duty on board during the whole of the voyage, for which he agreed to give him thirty guineas, and the sailor died before the voyage was finished, it was held that the contract was entire, and that the whole service, which was a condition precedent to the payment of the wages, not having been performed, no part of the thirty guineas could be recovered.² So, also, if a party agree to work for a year, for the certain sum of one hundred and twenty dollars, and before the expiration of the year, abandon such agreement without the consent of the other party, he cannot recover upon a *quantum meruit*.³ So, also, where a ship

¹ 1 Story's Eq. Jurisp. 470; Ex parte Smyth, 1 Swanst. R. 338; and the Reporter's note and cases cited. 1 Wms. Saunders, 320 (d) note (c); Chantler v. Leese, 4 Mees. & Welsb. 295; s. c. 6 Mees. & Welsb. 698.

² Cutter v. Powell, 6 Term R. 326; 3 Vin. Abr. Apportionment; Appleby v. Dods, 8 East, 300; Abbott on Shipping, (Story's ed. 1829,) 447, n. 1; Grinman v. Legge, 8 Barn. & Cresw. 326; s. c. 2 Man. & Ry. 438; Paradine v. Jane, Aleyn, 26; Jennings v. Camp, 13 Johns. 94; Reab v. Moor, 19 Johns. 337; Faxon v. Mansfield, 2 Mass. 147; Stark v. Parker, 2 Pick. 267; Ex parte Smyth, 1 Swanst. R. 338; the reporter's note and cases cited.

³ Stark v. Parker, 2 Pick. 267; Waddington v. Oliver, 2 New R. 61; Byrd

was let to freight at a certain rate per month, to be paid on her final discharge at the end of the voyage, and she was lost before the voyage was completed, it was held that no portion of the freight could be recovered.¹ In all these cases, it is wholly immaterial whether the exact and complete performance of the whole contract be rendered impossible by overwhelming necessity, or be occasioned by the negligence of the party.² If the contract be not completely executed, no action can be maintained for the consideration. Nor is this doctrine confined to the common law; for courts of equity have universally adopted the same rule, except in some few cases, in which there were peculiarly equitable circumstances, and which were founded in fraud, or surprise, or mistake.³

§ 22 *a.* So, also, in contracts for labor and services, where a specific work is agreed to be done for a specific price, the work must be wholly completed before any portion of the price can be claimed. Thus, if a painter should agree to paint a picture for a certain price, he could not deliver the picture unfinished, and claim a portion of the price.⁴ So, also, if A. agree to repair and make perfect a given article for a certain sum of money, he could recover nothing for

v. Boyd, 4 McCord, 246; *Willington v. West Boylston*, 4 Pick. 103; *Chandler v. Thurston*, 10 Pick. 209; *Shaw v. Turnpike Co.* 2 Penn. 454; *Huttman v. Boulnois*, 2 Car. & Payne, 510; *Philbrook v. Belknap*, 6 Verm. R. 383; *Hair v. Bell*, 6 Verm. R. 35. But see contra, *Britton v. Turner*, 6 N. Hamp. R. 481.

¹ *Byrne v. Pattinson*, Abbott on Ship. 347. See also, *Smith v. Wilson*, 8 East, R. 473; *Mitchell v. Darthez*, 2 Scott, R. 771; *Gibbon v. Mendez*, 2 Barn. & Ald. 17.

² *Paradine v. Jane*, Aleyn, 26, 27. See Am. Jurist, Oct. 1833, Art. 3, p. 251; *Gilpins v. Consequa*, 1 Pet. C. C. R. 91; *Youqua v. Nixon*, 1 Pet. C. C. R. 221; *Ex parte Smyth*, 1 Swanst. R. 338, and the reporter's note and cases cited.

³ 1 Story's Eq. Jurisp. 470 to 479.

⁴ *Cutter v. Powell*, 1 Smith's Leading Cases, 13 note.

partially repairing it.¹ The ground upon which this rule rests is, that the performance of the whole is the essential consideration of the contract, and is a condition precedent to the payment of any part of the price. But where the work is in its nature apportionable, and no entire sum has been fixed as the price therefor, the contract will be held to be apportionable. Thus, where the plaintiff was employed to repair a ship, and no total sum for the entire repairs was fixed, and after having done a portion of the work, he refused to go on until he should be paid therefor, it was held that he could recover a *quantum meruit*.²

¹ *Sinclair v. Bowles*, 9 Barn. & Cres. R. 92; 2 Wms. Saunders, 350 (n. 2); *Mucklow v. Mangles*, 1 Taunt. R. 318; *Farnsworth v. Garrard*, 1 Camp. R. 38.

² *Roberts v. Havelock*, 3 Barn. & Adolph. 404. In this case Lord Tenterden said, "I have no doubt that the plaintiff in this case was entitled to recover. In *Sinclair v. Bowles* (9 Barn. & Cres. 92) the contract was to do a specific work for a specific sum. There is nothing in the present case amounting to a contract to do the whole repairs, and make no demand till they are completed. The plaintiff was entitled to say, that he would proceed no further with the repairs till he was paid what was already due." Mr. Smith, in his *Leading Cases*, 13 note, after referring to this case, goes on to say, in respect to Lord Tenterden's language: "From these words it may be thought that his Lordship's judgment proceeded on the ground that the performance of the *whole work* is not to be considered a condition precedent to the payment of *any part of the price*, excepting when the sum to be paid and the work to be done are both specified (unless, of course, in case of special terms in the agreement expressly imposing such condition); and certainly good reasons may be alleged in favor of such a doctrine, for when the price to be paid is a specified sum, as in *Sinclair v. Bowles*, it is clear that the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that it shall be paid in instalments, contrary to the agreement, instead of in a round sum as provided by the agreement; but, where no price is specified, this difficulty does not arise, and perhaps the true and right presumption is, that the parties intended the payment to keep pace with the accrual of the benefit for which payment is to be made. But this, of course, can only be where the consideration is itself of an apportionable nature, for it is easy to put a case in which, though no price has been specified, yet the consideration is of so indivisible a nature, that it would be absurd to say that one part should be paid for before the remainder; as where

§ 23. Another illustration of this rule is to be found in cases of sales. Where a certain and definite thing is sold for a certain price, the contract is unquestionably an entirety, and the purchaser, if he retain the article, will be liable for the entire sum, unless there be a breach of warranty, or unless, under the circumstances, he be permitted to retain them as agent of the vendor. So, where two or more things are sold together for one gross sum, the contract is not susceptible of severance. Thus, where a cow and four hundred pounds of hay were sold for seventeen dollars; it was held, that the contract was entire.¹ And this rule obtains because the terms of such a contract not only afford no means of ascertaining the price affixed to each separate article, but also do not show that the purchaser would have been willing to take a part without the whole;—and therefore, great injustice might be done by construing the contract to be severable, and forcing the purchaser to take a portion at an estimated reduction of the price. The entirety is therefore properly considered as the only legal consideration.²

§ 24. There seems to be another class of contracts, partaking of the nature both of entire and of divisible contracts, in which, although a certain quantity or number of things is

a painter agrees to draw A.'s likeness, it would be absurd to require A. to pay a ratable sum on account when half the face only had been finished: it is obvious that he has then received no benefit, and never will receive any, unless the likeness should be perfected. There are, however, cases, that, for instance, of *Roberts v. Havelock*, in which the consideration is in its nature apportionable, and there, if no entire sum have been agreed on as the price of the entire benefit, it would not be unjust to presume that the intention of the contractors was that the remuneration should keep pace with the consideration, and be recoverable *toties quoties* by action on a *quantum meruit*." See also *Sickels v. Pattison*, 14 Wend. R. 257; *Withers v. Reynolds*, 2 Barn. & Adolph. 882; *Farnsworth v. Garrard*, 1 Camp. R. 38. See also Post.

¹ *Miner v. Bradley*, 22 Pick. 459.

² As to what constitutes an *entire contract* of sale, within the meaning of the Statute of Frauds, see Post, § 781.

brought together, no total price is fixed, but it is to be calculated at a certain rate per single article or measure; or where, the things being of different kinds, although a total price is named, a certain valuation is affixed to each thing; and in such cases the contract may be treated as a separate contract for each article, although they be all included in one instrument of conveyance. Thus, where A. purchased two parcels of real estate, the one for £700, the other for £500, and took one conveyance of both, A. being afterwards ejected from one by reason of defect of the title, was held to be entitled to recover therefor against the vendor.¹ So, also, where a certain farm, and dead stock, and growing wheat were all sold together, but a separate price was affixed to each, it was held, that the contract was only entire as to each item, and was severable into three contracts, and that a failure to comply with the contract as to one item did not invalidate the sale, and give the vendor a right to reject the whole contract.² In such cases, the contract may be considered as entire or separable, according to the circumstances of the particular case, and the criterion is to be found in the question, whether the whole quantity is of the essence of the contract. If, therefore, although the terms of the contract afford the rule for the apportionment of the consideration, yet if there be a special agreement to take the whole or nothing, or if the evidence clearly show that such was the purpose of the parties, the contract would be entire. Where, therefore, a contract was made to deliver a quantity of lumber at a given day, at a certain price per foot, to be paid for on the delivery and acceptance of *the whole*, it was held to be an entire contract, and the delivery of the whole of the lumber by the appointed day, to constitute a condition precedent to the right of payment of

¹ *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Miner v. Bradley*, 22 Pick. 459.

² *Mayfield v. Wadsley*, 3 Barn. & Cres. 361; s. c. 5 Dowl. & Ryl. 228; *Wood v. Benson*, 2 Crompt. & Jerv. 94. See also *Kingdom v. Cox*, 12 Jurist, 336.

any part, although the part delivered should have been used.¹ So, also, where an agreement was made by A. to work on B.'s farm for "seven months, at twelve dollars per month," and it appeared that the time of service was the essential feature of the contract, it was held, that the contract was entire, and that A. could not recover thereupon, if he left B.'s service before the expiration of the seven months, without good cause.² So, where the agreement is absolutely and unconditionally to take the whole of an indefinite quantity, at a certain rate per measure, and there is no usage of trade creating a different rule, the contract will be considered as an entirety, and not a separate sale of each portion measured; the measure being only a means of estimating the gross sum, and the quantity sold being an entire quantity.³

§ 24 *a*. So, also, where the plaintiff purchased of the defendant an entire cargo of yellow and white corn on board of the defendant's schooner, and agreed to pay one sum per bushel for the yellow, and another sum for the white, the defendant warranting the corn to be of a certain quality,—

¹ *Paige v. Ott*, 5 Denio, R. 406. See also *Davis v. Maxwell*, 12 Metcalf, R. 290.

² *Davis v. Maxwell*, 12 Metcalf, R. 286. See also *Irving v. Thomas*, 6 Shepley, R. 418; *Stark v. Parken*, 2 Pick. R. 267; *Ohnstead v. Beale*, 19 Pick. R. 528; *Miller v. Goddard*, 34 Maine, R. 102. But see *contra*, *Britton v. Turner*, 6 N. Hamp. R. 481.

³ *Waddington v. Oliver*, 2 Bos. & Pul. N. R. 61; *Symonds v. Carr*, 1 Camp. R. 361; *Walker v. Dixon*, 2 Stark. R. 281. See also Post, § 741. *Kingdom v. Cox*, 12 Jurist (Eng.), 336; *Franklin v. Fuller*, 4 Adolph. & Ell. 605, 606; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386; *Withers v. Reynolds*, 2 Barn. & Ald. 882. See Story on Sales, § 244, § 245, and notes; *Casamajor v. Strode*, 1 Cooper, Sel. Cas. 510; s. c. 8 Condén, Ch. R. 516; *Symons v. Carr*, 1 Camp. R. 361; *James v. Shore*, 1 Stark. R. 426; *Roots v. Dormer*, 4 Barn. & Cres. 77; s. c. 1 Nev. and Mann. 667. The case of *Baldey v. Parker*, 2 Barn. & Cres. 40, was not intended to define an entire contract, but what species of contract was referred to by the statute of frauds. The question which arose in the case was merely on the construction of the statute.

and the purchaser paid the seller \$1,200 "on account of corn per schooner," but upon unlading, all of the corn did not correspond to the warranty, and the purchaser, after accepting a portion of it, refused to receive the remainder, which was inferior, and brought his action to recover the difference between the sum he had paid and the sum due on the corn he had taken, it was held, that as the contract was entire, the action could not be maintained; and that to entitle A. to recover he should have rescinded the contract by returning, or offering to return all the corn, or he should have accepted all, and brought his action on the warranty.¹

¹ *Clark v. Baker*, 5 Metcalf, R. 452. Mr. Justice Hubbard, after commenting upon the cases of *Johnson v. Johnson*, 3 Bos. & Pul. 162, and *Miner v. Bradley*, 22 Pick. R. 459, said, "While we fully approve these cases and feel that they support the plaintiff's position, so far as relates to contracts for different articles, where the consideration is divisible, or to cases where two distinct contracts are embraced in one settlement; still we think they neither go the length nor do they support the doctrine that the contract is not entire merely because the several articles are sold by weight or measure, and the value is ascertained by the price affixed to each pound, or yard, or foot of the quantities contracted for. On the other hand, we believe the legal principle, governing in such cases, does not depend, either solely or necessarily, on the nature of the articles which are the subject of the contract, or on the prices affixed to each, but upon the nature of the contract itself. If the contract is entire, if it is one bargain, then it matters not whether there is one or are many articles — and though each may have an appropriate price. In the one case, the vendor might have been unwilling to sell one portion without selling the whole; in another, the buyer might be unwilling to take a part unless he could have the whole.

"The question then, in the present case, resolves itself into this: Was there one bargain for the whole cargo, or were there two distinct contracts for the yellow and white corn, or was there a separate and independent bargain for each bushel of corn contracted for, in consequence of which the receipt of one or more bushels of the warranted quality imposed no duty upon the plaintiff to retain the residue? And we are of opinion that the contract was an entire one. The bargain was not for 2,000 or 3,000 bushels of corn, but it was for the cargo of the schooner *Shylock*, be the quantity more or less; a cargo known to consist of two different kinds of corn; and the means taken to ascertain the amount to be paid were in the usual mode, by agreeing on the rate per bushel for the two kinds, and to take the whole. The schooner was

§ 24 *b*. Where, however, several different articles are bought at one time, it is often exceedingly difficult to determine

hauled to the wharf of the plaintiff, and the cargo put under his control, and with all the possession that could be given before it was unladed. No further act was to be done by the vendor. No measurement of quantity was to precede the delivery. For the whole quantity was delivered, whether more or less, and the measure was needed only to ascertain the amount of the respective kinds, and thus to fix the sum to be paid. And in pursuance of this contract, \$1,200, on account of the entire cargo, was advanced to the defendant. No agreement was made that the party might reject, as it came from the vessel, such part as did not agree with the warranty; and pay only for what he actually retained; but the bargain was for the whole cargo at an agreed rate per bushel. And although the plaintiff refused to take the whole from the vessel, and in consequence the defendant was compelled, for the purpose of obtaining his vessel, either to receive a part back, or to unlade it himself for the plaintiff; yet in principle we consider the delivery the same to the plaintiff as though the whole had been unladed in bulk into his warehouse, and the measuring had taken place afterwards. There is no ground, on the evidence as reported, to maintain that there were two contracts for the distinct kinds of corn; for it does not appear but that the 1,400 bushels, that were retained, consisted of a part of each. So that the plaintiff, to support his position, must contend, as he has contended, that the bargains in this case were separate bargains for each several bushel of a given quality, and for a distinct price. But this separation into parts so minute, of a contract of this nature, can never be admitted; for it might lead to the multiplication of suits indefinitely, in giving a distinct right of action for every distinct portion. As well might a man who sold a chest of tea by the pound, or a piece of cloth by the yard, or a piece of land by the foot or by the acre, contend that each pound, yard, foot, or acre, was the subject of a distinct contract, and each the subject of a separate action. The cases of *Waddington v. Oliver*, 2 New Rep. 61; *Leggett v. Cooper*, 2 Stark. R. 103; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386; *Baldey v. Parker*, 2 Barn. & Cres. 37; *Shaw v. Badger*, 12 S. & R. 275; and *Bowker v. Hoyt*, 18 Pick. 555, support the view we take of this contract.

“The plaintiff’s redress was easy — either to rescind the contract by returning all the corn purchased and suing for the money advanced; or by action upon his warranty, for the injury sustained by the delivery of an article inferior to that warranted.”

But in this case, upon subsequent trial, the court admitted evidence to prove a usage in the port where the corn was sold, that when a cargo of corn, lying in a vessel, is sold in bulk, under a warranty of quality, the purchaser is at liberty to receive and retain as much of the corn as corresponds to the warranty, and to reject the rest. *Clark v. Baker*, 11 Metcalf, R. 186. See Post, § 25 *a*, § 25 *b*.

whether the contract is entire or several. The cases are very contradictory upon this point, the same kind of contract being held to be entire at one time, and several at another. Thus, where a number of horses were set up at auction in separate lots, and the plaintiff bid off three of them, it was held by Lord Kenyon, that the contract was entire, and as title could only be made to one of them, that the plaintiff was not bound to keep it, and could recover the deposit money for all.¹ Again, where the plaintiff went into a linen-draper's shop and purchased a number of different articles, a separate price being agreed upon for each, and a bill of parcels of the whole was sent to his house; it was held, by all the judges, that the contract was entire; and as the whole amount of the sale was £70, that the sale was within the statute of frauds, although the price of each article was under £10.² So, also, where at an auction sale certain railway shares were sold in distinct lots of 100 shares each, and the defendant bought three of them at three distinct biddings, and a bill of parcels was given for 300 shares; it was held, that the jury were warranted in treating it as an entire contract, — the subsequent delivery and acceptance of the bill of parcels showing, that the parties treated the contract as an entire one.³ So, also, where a certain number of lamps of entirely different kinds and prices, and to be used for different purposes, were contracted for, part of them being already manufactured, and part to be manufactured according to order, — it was held, that the contract was entire, and that an acceptance of a part was an acceptance of the whole, under the statute of frauds.⁴ Mr. Baron Alderson

¹ *Chambers v. Griffiths*, 1 Espinasse, N. P. R. 151.

² *Baldey v. Parker*, 2 Barn. & Cres. 42. The decision in this case seems to be entirely founded on reasons growing out of the provisions of the statute of frauds.

³ *Franklyn v. Lamond*, 4 Mann. Gra. & Scott, 647.

⁴ *Scott v. The Eastern Counties Railway Co.* 12 Mees. & Welsby, 33. See also to the same point, *Sleddon v. Cruikshank*, 16 Mees. & Welsb. 71; *Atkinson v. Smith*, 14 Mees. & Welsb. 695.

in this case said, "The transaction constituted but one contract. There is no distinction between this case and that of a party who goes into a shop and buys fifty different articles at the same time. It is clear that such a person does not make fifty different contracts. If a man enters into an entire agreement for goods made, and for others to be made, his accepting part of the goods made is evidence of his having entered into the agreement. That is the true object and meaning of the statute. The articles bargained to be made are treated for this purpose as goods actually made, although they are not in existence at the time of the agreement." Lord Abinger also said, "I think the order for the ready-made lamps, and that given for the triangular one, amounted but to one contract. Can it be said, that, if a man goes to a tailor's shop and buys a suit of clothes which are ready-made, and at the same time orders another suit to be made for him, and the former are sent home to and accepted by him, he is not bound to pay for the latter."

§ 24 *c.* But, on the other hand, a contrary rule has been held. Thus, where several distinct lots of growing crops were knocked down to a bidder, and his name marked against them in the catalogue of sale, it was held, that a distinct contract arose for each lot, and as each lot was under £20 in value, that the memorandum did not require a stamp.¹ So, also, the same rule was held in another case, where several lots of growing turnips were sold; and Mansfield, Ch. J. said, "The question is whether the contract should be in writing as being for a sale of goods amounting to £10; there is no ground for that objection, for the contract for each stitch was a separate sale; for the same reason no stamp was necessary, because no one lot was worth £20."² And also, Justices

¹ *Roots v. Lord Dormer*, 4 Barn. & Adolph. 77.

² *Emmerson v. Heelis*, 2 Taunt. R. 46. See also, *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Mayfield v. Wadsley*, 3 Barn. & Cres. 361; Ante, § 24.

Heath and Chambre said, "As soon as the purchaser had bought the first lot, there was a complete contract, which could not be avoided by his buying another lot." In these two last cases no bill of parcels seems to have been given.

§ 24 *d.* In this diversity of cases, it is difficult to state any rule. But on the whole, the weight of opinion and the more reasonable rule would seem to be, that where there is a purchase of different articles, at different prices, at the same time, the contract would be several as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter, or by the act of the parties. Where a bill of parcels is taken, and includes the articles bought, under one whole price, it would, if accepted, afford evidence of an intention by both parties to treat the contract as entire. And wherever the failure as to a part would materially defeat the objects of the contract, and would have affected the sale, had such failure been anticipated, the contract would be entire. This rule would found the interpretation of the contract on the intention of the parties, as manifested by their acts, and by the circumstances of the case.¹ Of course, if two articles be bought at the same time under the agreement, that one may be returned if it do not prove satisfactory, there would be no entirety of contract.²

¹ The doctrine of Lord Kenyon in *Chambers v. Griffiths*, 1 Esp. B. R. 151, (*ubi sup.*) was said by Lord Brougham in *Casamajor v. Strode*, (1 Cooper, Sel. Cas. 510; s. c. 8 Conden's Ch. R. 516,) not to be sound doctrine, and that Lord Eldon in the note to *Roffey v. Shallcross*, (4 Madd. Ch. R. 122, Phil. ed.) carried the rule too far the other way. The rule, which he laid down, founded the entirety of the contract upon the question, whether the circumstances showed that the purchaser would not have bought, except in the expectation of receiving the whole. See also 2 Kent, Comm. Lect. xxxix. p. 470; *Barclay v. Tracy*, 5 Watts & Serg. 45; *James v. Shore*, 1 Starkie, R. 426; *Miner v. Bradley*, 22 Pick. R. 458. But see *Mills v. Hunt*, 17 Wend. R. 333; s. c. 20 Wend. R. 431; *Judson v. Wass*, 11 Johns. R. 525. See Post, § 480, § 482.

² *Price v. Lea*, 1 Barn. & Cres. 156.

§ 25. It follows, from these rules, that neither party can rescind an entire contract in part, and enforce it in part, and that each party is liable for the whole consideration, or for no part of it. If, therefore, the party advancing the consideration would bring an action against the other to recover it, he must rescind the contract totally.¹ The contract may, however, be apportioned with the consent of the parties, whether it be expressed or implied, so that the excess of consideration advanced, may be recovered in an action for money had and received; and a consent by either party to treat the contract as several will be implied from the doing by him of any act inconsistent with the entirety of the contract. Thus, if the purchaser of a gross number of bales of cotton, accept a portion only of them without objection, and not in the course of receiving the whole, his acceptance will be considered as a waiver of his right to insist upon the entirety of the contract.²

§ 25 *a*. So, if by the terms of the contract there be any specific time within which goods are to be delivered, and the seller only deliver a portion within the time, the vendee, if he continue to retain such portion and make no offer to return them, will be considered as waiving his right to treat the contract as entire, and will be responsible for the portion actually received. Thus, where there was an absolute purchase by the defendant of 250 bushels of wheat, at eight shillings a bushel, and the plaintiff only delivered 130 bushels, before the time for completing the contract expired, which were accepted

¹ *Clark v. Baker*, 5 Metcalf, R. 452; *Franklin v. Fuller*, 4 Adolph. & Ell. 605; *Chanters v. Leese*, 4 Mees. & Welsb. 295. Post, § 977.

² *Champion v. Short*, 1 Camp. R. 53; *Roberts v. Beattie*, 2 Penn. R. 63; *Coolidge v. Brigham*, 1 Metcalf, 550; *Taylor v. Hilary*, 1 Crompt. Mees. & R. 741; *Long v. Preston*, 2 Moore & Payne, 262; *Wheeler v. Braid*, 12 Johns. 363; *Patmore v. Colman*, 1 Crompt. Mees. & R. 65; *Carter v. Carter*, 14 Pick. 424; *Payne v. Whale*, 7 East, 274; *Danforth v. Dewey*, 3 New Hamp. 79; *Bradford v. Manly*, 13 Mass. 139; *Raymond v. Bearnard*, 12 Johns. 274; *Davis v. Marston*, 5 Mass. 199; *Hurst v. Orbell*, 8 Adolph. & Ell. 107; s. c. 3 Nev. & P. 237; *Connor v. Henderson*, 15 Mass. 319.

and retained by the buyer, it was held that he was liable for the price of the 130 bushels, on the ground that as he retained a portion, after failure of the seller to comply with his agreement, he must be understood to have abandoned his rights to treat the contract as an entirety.¹ Especially would this be the case where the vendee retains a portion of the goods after the vendor has refused to deliver the remainder.²

§ 25 *b*. But these exceptional cases are peculiar in their circumstances, and depend upon an implied agreement by *both* parties to treat the contract as divisible and not entire; since in the cases put, the vendee would on no other supposition be entitled to retain a part of the goods in case of failure by the vendor to comply with his agreement; and the vendor on his side must be understood as only offering a part. But one party alone would have no authority to change the agreement at his option so as to render it divisible, and, therefore, if the vendor be willing to deliver the whole, the vendee could not object that

¹ *Oxendale v. Wetherell*, 9 Barn. & Cres. 386. In this case Parke, J. said, "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." Rule refused. So, also, in *Reed v. Rann*, 10 Barn. & Cres. 439; Baron Parke said, "In some cases, a special contract, not executed, may give rise to a claim in the nature of a *quantum meruit*, *ex. gr.*, where a special contract has been made for goods, and goods sent not according to the contract are retained by the party, there a claim for the value on a *quantum valchant* may be supported, but then, from the circumstances, a new contract may be implied." In New York the opposite doctrine obtains. See *Champlin v. Rowley*, 13 Wend. R. 258; 18 Ib. 187; *Paige v. Ott*, 5 Denio, R. 406; *Knight v. Dunlop*, 4 Barb. R. 36; *Mead v. Degolyer*, 16 Wend. R. 632. So also, in Ohio, *Witherow v. Witherow*, 16 Ohio, R. 238. But Mr. Justice Read dissented.

² *Bowker v. Hoyt*, 18 Pick. R. 155. See post, *Performance*, § 967, et seq. *Lucas v. Godwin*, 3 Bing. N. C. 737.

as part only was according to the agreement, or warranty, he would keep and pay for a part only; but he must refuse the whole and rescind the contract entirely, or accept the whole and bring an action for damages, on the warranty.¹

§ 25 *c.* Again, if one party is prevented from fulfilling his contract in its entirety by the fault of the other party, an agreement would be implied on the part of the person in fault to treat the contract as divisible, so that the other party would be enabled to recover a *quantum meruit* for what he had performed.²

§ 25 *d.* Where a contract, though entire in its form, relates to several distinct and independent acts to be done at different times, it is divisible in its nature, and an action of assumpsit will lie on each default. Thus, if the agreement be to pay £20 by daily instalments of five pounds, upon failure to pay the first instalment, an action of assumpsit may be brought therefor.³

¹ Clark *v.* Baker, 5 Metcalf, R. 452; s. c. 11 Metcalf, R. 186. See also Franklin *v.* Fuller, 4 Adolph. & Ell. 605, 606; Walker *v.* Dixon, 2 Stark. R. 281; Withers *v.* Reynolds, 2 Barn. & Ald. 882. Story on Sales, Ch. xiv.

² Planché *v.* Colburn, 8 Bing. R. 14; Moulton *v.* Trask, 9 Metcalf, R. 577; Goodman *v.* Pocock, 15 Q. B. 576; Derby *v.* Johnson, 21 Verm. R. 18; Clark *v.* Marsiglia, 1 Denio, R. 317; Hall *v.* Rupley, 10 Barr R. 231; Wilhelm *v.* Caul, 2 Watts & Serg. 26; Chaplin *v.* Rowley, 18 Wend. R. 187.

³ Badger *v.* Titcomb, 15 Pick. R. 414. In this case Mr. Justice Wilde says, "With respect to the first point, it is undoubtedly true, that only one action can be maintained for the breach of an entire contract, unless, by the terms of it, it is in its nature divisible. But if one contracts to do several things, at several times, an action of assumpsit lies upon every default; for although the agreement is entire, the performance is several, and the contract is divisible in its nature. Thus, on a note or other contract payable by instalments, assumpsit lies for non-payment after the first day; or where interest is payable annually, the payment of the principal being postponed to a future time, assumpsit lies for the non-payment of interest, before the principal becomes due and payable. In all such cases, although the contract is in one sense entire, the several stipulations as to payment and performance are several, and are considered in respect to the remedy as several contracts. This principle has

CONDITIONAL AND ABSOLUTE CONTRACTS.

§ 26. Contracts are also divided into *conditional* and *absolute*. An absolute contract requires no explanations. It is simply

long been well settled, although the law in this respect has been very much modified by modern decisions.

"Still, however, the law seems to remain unchanged in respect to obligations to pay money by instalments, so that debt will not lie till all the days of payment are past. A distinction has been made between a contract to pay five sums of £20 each, on five different days, and a contract to pay £100 by five sums of £20 on different days; — a distinction, as Lord Loughborough remarks, in the case of *Rudder v. Price*, 1 H. Bl. 550, which is merely verbal, the substantial meaning being the same in each.

"After the action of *assumpsit* was introduced, a more liberal construction of contracts not under seal was adopted. But, at first, it was held, that although, where the contract was to pay by instalments, *assumpsit* would lie on default of the first payment, yet the plaintiff was obliged to demand his whole damages, although only one of the several instalments was payable; on the ground that the contract was entire, and that no new action could be maintained. In the case of *Peck v. Redman*, Dyer, 113, the judges were equally divided. That was *assumpsit* on a contract to deliver twenty quarters of barley annually, during the lives of the contracting parties. The breach was for non-delivery of the twenty quarters of barley for three years, and the question was whether the plaintiff was entitled to damages in recompense of the whole bargain, as well for the time to come as for the past. The case does not appear to have been decided; the whole doubt and difficulty arose from considering the contract entire and indivisible. This doubt does not appear to have been finally removed till the case of *Cooke v. Whorwood*, 2 Saund. 337, where the court determined, that in *assumpsit* to perform an award whereby the defendant was awarded to pay the plaintiff several sums of money, *at several times*, an action might be maintained for such sum only, as was due at the time when the action was brought; and that the plaintiff should recover accordingly, and have a new action as the other sums became due *toties quoties*. In the case of *Rudder v. Price*, before cited, the cases on this point are reviewed by Lord Loughborough in a very able opinion, and I am not aware that any question has since been made as to the law in this particular. So that the principle is well established, that a contract to do several things at several times, is divisible in its nature; and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract." See also *Knight v. New England Worsted Co.* 2 Cushing, 286. It appears that the distinction between debt and *assumpsit* does not now obtain in England. See *Stone v. Rogers*, 2 Mees. & Welsb. 443.

an agreement to do or not to do something, at all events. A conditional contract is an executory contract, the performance of which depends upon a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do, or not to do, something; but it is a contract, whose very existence and performance depend on a contingency and condition.

§ 27. A condition may be either precedent or subsequent. A condition precedent is a condition which must happen before either party becomes bound by the contract.¹ Thus, if a person agree to purchase the cargo of a certain ship at sea, provided the cargo prove to be of a particular quality, or provided the ship arrive before a stated time, or at a particular port, each proviso is a condition precedent to the performance of such a contract, and unless the cargo prove to be of the stipulated quality, or the ship arrive within the agreed time, or at the specific port, the agreement is null and void.² So, also, if A. agree with B. to manufacture for him certain articles of iron-work, and B. agree to furnish materials therefor, and the use of all necessary tools and certain mill-power, the furnishing of the tools, materials, and mill-power, would be a condition precedent to the obligation of A. to manufacture the articles.³ So, also, sales of goods "on trial," the condition of which is, that the seller shall not be bound to take the goods unless they prove satisfactory to the purchaser;⁴ and agreements to pay a certain freight,⁵ or to repay advances on bot-

¹ For a very elaborate discussion of the subject of conditions, see *Gray v. Friar*, 26 Eng. Law & Eq. R. 27.

² *Hawes v. Humble*, cited 2 Camp. R. 327; *Boyd v. Siffkin*, 2 Camp. R. 327; *Idle v. Thornton*, 3 Camp. R. 274; *Ellis v. Mortimer*, 1 Bos. & Pul. N. P. 257; *Com. Dig. Agreement, A.*; *Hayward v. Scougal*, 2 Camp. R. 56; *Hayden v. Stoughton*, 5 Pick. R. 528. But see *Fischell v. Scott*, 28 Eng. Law & Eq. R. 27.

³ *Milldam Foundry v. Hovey*, 21 Pick. R. 417.

⁴ *Ibid.* *Brown on Sales*, § 44, 45; *Com. Dig. Agreement, A. Condition, C.*

⁵ *Byrne v. Pattison*, *Abbott on Ship*. 347; *Smith v. Wilson*, 8 East. R. 473;

tomry bonds, conditioned on the arrival of the vessel at her port of discharge, — are also examples of this species of conditional contracts. So, where there is a contract to deliver goods forthwith, the price to be paid in fourteen days, the delivery is a condition precedent to the payment.¹

§ 28. A condition subsequent is one, which follows the performance of the contract, and operates to defeat and annul it, upon the subsequent failure of either party to comply with the condition. Thus, a devise of land for “the purpose of building a school-house, provided it be built” on a certain site, was held to be a present grant of the land, subject to forfeiture, in case the school-house should not afterwards be built.² So, also, where a lease was made, containing a stipulation that, “if the lessee suffer more than one person to every one hundred acres to reside on, use, or occupy any part of the premises, the lease shall be void,” the stipulation was considered as a condition subsequent, the non-compliance with which annulled the lease.³

§ 28 *a*. Sometimes a condition is of such a nature that its operation may be either precedent or subsequent. Thus where in a policy of insurance there is a clause that no action shall be sustained unless brought within twelve months from the loss, such a stipulation has been sometimes called a condition precedent to the right of recovery, and sometimes a condition subsequent by which the right to indemnity for the loss is defeated, which is the same thing under a different designation.⁴

Mitchell v. Darthez, 2 Scott, R. 771; *Gibbon v. Mendez*, 2 Barn. & Ald. 17; Post, § 977.

¹ *Staunton v. Wood*, 7 Eng. Law & Eq. R. 411.

² *Hayden v. Stoughton*, 5 Pick. R. 528; *Brigham v. Shattuck*, 10 Pick. R. 309; *Atkins v. Howe*, 18 Pick. R. 16; *Dresser Manuf. Co. v. Waterston*, 3 Metcalf, R. 9.

³ *Jackson v. Brownell*, 1 Johns. R. 267.

⁴ *Wilson v. Etna Ins. Co.* 8 Boston Law Rep. N. S. 329; *Cray v. Hartford Ins. Co.* 1 Blatchf. R. 280.

§ 29. No particular words are necessary to constitute a condition precedent or a condition subsequent, and if there be any question upon this point it must be determined by the intention of the parties, as manifested by circumstances of the particular case.¹ For not only may the exact terms of a condi-

¹ *Worsley v. Wood*, 6 T. R. 720; *Tufts v. Kidder*, 8 Pick. R. 537; *Johnson v. Reed*, 9 Mass. R. 78; *Gardiner v. Corson*, 15 Mass. R. 500; *Knight v. The New Eng. Worsted Co.* 2 Cushing, R. 286; *Howland v. Leach*, 11 Pick. R. 151; *Kane v. Hood*, 13 Pick. R. 281; *Grey v. Friar*, 26 Eng. Law & Eq. R. 27, 33. *Crompton, J.* "This was an action of covenant to recover rent, alleged to be due on the lease of a coal-mine. The defendants below having pleaded that the tenancy had been determined by them under a proviso enabling them to determine the lease by notice at the end of eight years, the plaintiff replied, showing the non-performance of certain covenants; and the question arose, whether, on the true construction of the proviso, the performance of the covenants was or was not a condition precedent to the determination of the term. Whether particular words do or do not amount to a condition precedent must be gathered from the real intention of the parties, as appearing upon the whole instrument. If such intention is apparent, the parties must be bound by the bargain which they have chosen to enter into; but in ascertaining the meaning and true construction of the deed, it is by no means unimportant to observe what the effect of the construction, one way or the other, would be. Accordingly, the counsel for the plaintiffs in error, in their argument, pointed out the multiplicity and minute nature of the covenants contained in this lease, and argued, from the impossibility of performing all of them to the letter, that the parties were not likely to have intended that the benefit of this clause was to be lost to the lessees by the infraction of any of the numerous and minute covenants. A proviso of this kind being for the benefit of the lessees, and being one in its nature to be useful only when the lessees desire to put an end to their lease against the will of their lessor, it seems hardly likely the arrangement should be such as to leave it practically in the power of the lessor to say whether the lessees should ever be able to avail themselves of it or not. I quite agree with what was said in the Exchequer Chamber, that these reasons would not justify the court in refusing to put the construction upon the words which they plainly require; but they appear to me to be important in ascertaining what that construction is, and whether the words do not really bear a construction which would not lead to consequences which the parties were not likely to have contemplated. Words capable of being treated as conditions precedent to rights of action, have in many cases, some of which were cited at the bar, been construed as not amounting to conditions precedent, by looking at the provisions of the whole deed as assisting to ascertain the meaning and

tion be modified so as to harmonize them with the evident intention of the parties, but where no condition has been expressed, it may be implied from the facts of the case.¹ Thus, where a contract was made in London for the sale of tallow by a particular ship "on arrival," and it was specified, that if it did not arrive before a stated day, the bargain was to be void, and the ship was wrecked, but the cargo was saved, and might have been sent round to London by a different conveyance than the ship, but was not; it was held that the manifest intention of the parties was, that the contract should be void, unless the tallow arrived in the ordinary course of trade and navigation, and that the sellers were not, therefore, answerable for a non-delivery thereof.² So, also, where in a repository for the sale of horses by auction, certain rules were posted up regulating sales by private contract in such place, and affixing certain conditions thereto, it was held, that where the buyer had notice of them, he impliedly agreed to be bound by them as the conditions of the sale, although no express reference was made thereto.³

§ 30. A condition precedent corresponds to the suspensive condition of the civil and Scottish law, and a condition subsequent to the resolute condition. Mr. Brown, in his *Treatise on Sales*, says: "A condition resolute, when it is accomplished, puts an end to the contract, but does not suspend its existence." "The contract is perfect, notwithstanding the presence of a condition subsequent, and is merely liable to be rescinded, on the condition being accomplished." "The effect of a proper suspensive condition, or condition precedent, in the contract of sale, is, that there is no complete sale, until the

construction of the particular expressions; and words of this nature cannot be said necessarily to amount to conditions precedent, as they are not construed to do so when they occur in the common case of covenants for quiet enjoyment."

¹ *Siffkin v. Boyd*, 2 Campb. R. 327; *Idle v. Thornton*, 3 Campb. R. 274; *Story on Sales*, § 252.

² *Idle v. Thornton*, 3 Campb. R. 274.

³ *Bywater v. Richardson*, 3 Nev. & Man. 748; s. c. 1 Adolph. & Ell. 508.

condition is accomplished." So, also, Pothier¹ says: "Les conditions resolutoires sont celles qui sont opposées, non pour suspendre l'obligation jusque à l'accomplissement, mais pour la faire cesser lorsqu'elles s'accomplissent. Une obligation contractée sous une condition resolutoire est donc parfait dès l'instant du contract."

31. Where no time is fixed, within which a condition shall be performed, the rule is, that it must be performed within a reasonable time.² Of course, no universal rule can be laid down as to what constitutes reasonable time, which will apply to all cases. The only rule, which can be stated, is, that any delay in the performance of the condition, which operates as an injury to the other party, will be considered as unreasonable.³ What is such a delay in any particular case, must depend upon its peculiar circumstances. In relation to conditions precedent which operate to the advantage of the party performing the first act, performance is usually at the option of such party at any time during his life.⁴ But in relation to conditions subsequent, the rule is otherwise,⁵ and the time of performing the condition does not depend upon the mere will and pleasure of the party who is to perform it, but on the circumstances of the case, and it must be done within a reasonable time.⁶ If, however, the time of performance be specified in the contract, the condition must be performed at the appointed time.⁷

¹ *Traité des Obligations*, No. 224. See also No. 198.

² *Hamilton v. Elliott*, 5 Serg. & Rawle, 384; *Hayden v. Stoughton*, 5 Pick. R. 528.

³ *Ibid.*

⁴ *Finlay v. The King's Lessee*, 3 Peters, R. 376; Plowd. 16; *Hayden v. Stoughton*, 5 Pick. R. 534; *Bothy's Case*, 6 Co. R. 31; *Com. Dig. Condition*, G. 3, 4.

⁵ *Ibid.* *Hayden v. Stoughton*, 5 Pick. R. 534.

⁶ *Com. Dig. Condition*, G. 5.

⁷ As to time of Performance, see post, § 971, 971 a, § 997 a. See also, 1 Wms. Saunders, 320 b.

§ 32. Again, where the condition is precedent, it must be strictly performed, in every particular, in order to entitle the party, whose duty it is to perform it, to enforce the contract against the other party.¹ Thus, where A. covenanted to pay B. for doing the carpenter's work on certain houses, when he should receive from the architect his certificate, that "the work was fully and completely finished according to the specification," it was held to be a condition precedent, which must be strictly performed before payment could be recovered; and that a certificate by the architect, that the houses, although not finished exactly according to the specification, yet were "finished" in such a "manner, that *he* would accept them, if he were the owner," and that "he was satisfied as to the work and material," was not a sufficient performance of the condition.² Nor does it matter that such condition is difficult or foolish, for if it be so, it is the fault of the party who engages to perform it, and he should suffer the consequences.³ But if the condition be impossible or illegal, or repugnant at the time the contract is made, or become so afterwards, it will be void, and the contract will be considered absolute.⁴ So, also, if a strict performance be waived or prevented by the party, who had a right to insist upon it, he cannot absolve himself from his part of the contract, on the ground of a non-performance of the condition.⁵ It would seem, also, that a

¹ *Dana v. King*, 2 Pick. R. 155; *Seymour v. Bennet*, 14 Mass. R. 266; *Hunt v. Livermore*, 5 Pick. R. 395; *Albany Dutch Church v. Bradford*, 8 Cowen, R. 457; *Shaw v. Turnpike Co.* 2 Penn. 454; *Johnson v. Reed*, 9 Mass. R. 78; *Byrne v. Pattinson*, *Abbott on Ship*. 347, Ante, § 27; *Mason v. Harvey*, 20 Eng. Law. & Eq. R. 541.

² *Smith v. Briggs*, 3 Denio, R. 73.

³ *Worsley v. Wood*, 6 T. R. 720; *Com. Digest*, D. 1. Post, § 462, § 463.

⁴ See post, § 462, § 463, § 997a, and cases cited; *Harvey v. Gibbon*, 2 Lev. R. 161; *Nerot v. Wallace*, 3 T. R. 17; *Gilpins v. Consequa*, 1 Peters, C. C. 91; *Thompson v. Miles*, 7 T. R. 384; *Hughes v. Edwards*, 9 Wheat. R. 345, 489.

⁵ *Williams v. The Bank of the United States*, 2 Peters, R. 102; *Cooper v. Mowry*, 16 Mass. R. 7; *Stockton v. Turner*, 1 J. J. Marsh. R. 192; *Webster*

performance according to the exact terms, or in the exact mode stated in the contract, would not, in all cases, be necessary, but that a substantial performance would suffice, provided no injury or inconvenience was thereby occasioned to the other party, and provided the exact performance of the condition, as to mode and time, were not of the essence of the contract.¹ Such cases are, however, in their nature exceptional, and peculiar in their circumstances. The mere fact, however, that the performance of the condition does not accrue to the benefit of the other party, will be no excuse for the non-performance thereof.²

§ 32 *a*. A waiver of the performance of a condition is not to be implied from the mere silence of the other party in case of a breach, unless such silence be inconsistent with any other explanation;³ nor will a mere indulgence be considered as a waiver of forfeiture.⁴ But if, a condition precedent being unperformed, the other party proceed to perform his part of the contract, such an act will be construed as a waiver of the condition by him, and he will thereby be estopped from relying upon the non-performance thereof in an action brought against him for negligence in the performance of his contract.⁵ So, if the condition be to perform a certain thing by a certain day, and the performance of another thing on another day be accepted in place thereof, the strict performance of the condition will be waived.⁶ A parol waiver cannot, however, be

v. Coffin, 14 Mass. R. 196; 1 Pick. R. 287; *Miller v. Ward*, 2 Conn. R. 494; *Crump v. Mead*, 3 Miss. R. 233; *Clark v. Moody*, 17 Mass. R. 149; *United States v. Arredondo*, 6 Peters, R. 691; *Whitney v. Spencer*, 4 Cowen, R. 39; *Merrill v. Emery*, 10 Pick. R. 507.

¹ *Worsley v. Wood*, 6 T. R. 720.

² *Jarvis v. Rogers*, 3 Verm. 339; *Gray v. Blanchard*, 8 Pick. R. 290.

³ *Gray v. Blanchard*, 8 Pick. R. 292; *Jackson v. Crýsler*, 1 Johns. Cas. 125.

⁴ *Ibid.* See post, 977 *a*.

⁵ *Betts v. Perine*, 14 Wend. R. 219.

⁶ *Warren v. Mains*, 7 Johns. R. 476; *Lindsey v. Gordon*, 1 Shepley, R. 69; *Porter v. Stewart*, 2 Aiken, R. 427.

made of a contract under seal.¹ Conditions in a contract are to be construed strictly against those for whose benefit they are reserved, when they impose burdens on other parties; and they will not be extended by implication beyond their actual terms, and the indisputable intention of the parties.² All statutes, therefore, imposing penalties, or duties, or taxes, on subjects or citizens, (which are in the nature of conditions,) are to be construed strictly against the government, and are not to be extended, by implication, beyond the clear import of the language used.³

32*b*. Conditions may be divided into four classes:—1st. Those which are possible at the time of their creation, and afterwards become impossible either by the act of God or by the act of the party. 2d. Those which are impossible at the time of their creation. 3d. Those which are against law or public policy. 4th. Those which are repugnant to the grant or gift by which they are created, or to which they are annexed.⁴ The rule in respect to the two latter classes is, that they are void.⁵ So, also, if they be impossible in their inception, or be rendered impossible by the act of the party entitled to the benefit of them, or by the act of God, they are generally held void, though courts of equity will in some cases afford relief. But if they be subsequently rendered impossible by the act of the party who is bound to perform them, he is treated as *in delicto*, and the condition is obligatory on him.⁶

¹ *Gray v. Blanchard*, 8 Pick. R. 295; *Jackson v. Chrysler*, 1 Johns. Cas. 125; *Porter v. Stewart*, 2 Aiken, R. 417.

² *Catlin v. The Springfield Fire Insurance Co.* 1 Sumner, R. 440.

³ *U. S. v. Wigglesworth*, 2 Story, R. 369; *Andrews v. U. S.* 2 Story, R. 200. As to performance of contracts, see post, § 967–977.

⁴ 2 Story, Eq. Jurisp. 1304; Co. Litt. and note by Butler, 206*a*.

⁵ See post, § 462, *Illegal and Impossible Considerations*, and chap. xviii. *Illegal Contracts*.

⁶ See 2 Story, Eq. Jurisp. § 1304 and § 1307 and cases cited; Com. Dig. Condition D. 1; *Thornborrow v. Whiteacre*, 2 Ld. Raym. R. 1169; Co. Litt.

§ 32 *c.* Again, in these cases, conditions subsequent may produce a different result from conditions precedent. Thus, where an estate is granted upon a condition subsequent to be performed after the estate is vested, and it is rendered void by any of the causes above stated, the estate becomes absolute. But if the condition be precedent to the vesting of the estate, if it be void, it renders the grant void also, and the grantee can take nothing thereby.¹

JOINT AND SEVERAL CONTRACTS.

§ 33. Contracts may also be either joint or several, or joint and several.

33 *a.* The first rule governing a contract where there is more than one party on either side, is that it is to be construed as a joint right or obligation, unless it be made several by the terms of the contract; or as the rule is stated in Shepherd's Touchstone,² "If two, three, or more bind themselves in an obligation, *obligamur nos*, and say no more, the obligation shall be taken to be joint only, and not several." This, however, is a rule of construction and not of law, and is adopted upon the presumption that parties only intend to assume a joint responsibility, unless they directly assume a several responsibility. If, therefore, there should be words indicating or implying a several right or liability, the contract will not be treated as joint solely, unless such a construction be required

206 *b*, 207 *a*, Butler's note; Graydon *v.* Hicks, 2 Atk. R. 18; Jones *v.* The Earl of Suffolk, 1 Br. Ch. R. 528. See also Story on Bailm. § 25. See Post, § 169.

¹ 2 Black. Comm. 156, 157; Co. Litt. 206 *a*; Cary *v.* Bertie, 2 Vernon, R. 339; 1 Fonbl. Eq. B. 1, ch. 4, § 1, note *e*.

² 1 Shep. Touchstone, 375. See also Bacon, Abr. tit. Obligation D.; King *v.* Hoare, 13 Mees. & Welsb. 499; English *v.* Blundell, 8 Car. and Payne, 332; Hill *v.* Tucker, 1 Taunt. R. 7; Yorks *v.* Peck, 14 Barb. R. 644; Byers *v.* Dobey, 16 Black, R. 236; 1 Saund. 291 *b* n. 4; Sorsbie *v.* Park, 12 Mees. & Welsb. 156.

to carry out the intention of the parties, and to meet the justice of the case.¹

33*b*. It has indeed been held in a series of cases that a contract is to be construed solely according to the *interest* of the parties, so as to be several if the interest be several, and joint where the interest is joint, notwithstanding the fact that the terms of the contract are joint.² This doctrine has, however, been strenuously denied, and has formed a topic of discussion and difference in several late cases in the Courts of Exchequer and of the Queen's Bench.³ The result of these cases

¹ Withers *v.* Bircham, 3 Barn. & Cres. 254; *Servante v. James*, 10 Ibid. 410; *Anderson v. Martindale*, 1 East, R. 501.

² *James v. Emery*, 5 Price, R. 529; *Servante v. James*, 10 Barn. & Cres. 410; *Lane v. Drinkwater*, 1 Crompt. Mees. & R. 599; *Withers v. Bircham*, 3 Barn. & Cres. 254; *Shep. Touchstone*, 166 and note by Mr. Preston; *Eccleston v. Clepsham*, 1 Wms. Saund. R. p. 1; *Carthrac v. Brown*, 3 Leigh, R. 98; *Ludlow v. McCrea*, 1 Wend. R. 228; *Trustees of Perryville v. Letcher*, 1 Munroe, R. 11.

³ The rule as stated by Sir Vicary Gibbs in *James v. Emery*, 5 Price, R. 533, was as follows: "Wherever the interest of parties is separate the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint, and where the interest is joint the action must be joint, although the covenant in language purport to be joint and several." In commenting on this passage, Mr. Preston, in his note to the passage in *Sheppard's Touchstone*, p. 166, says, after citing it, "With great deference, however, the correct rule is, that, by express words clearly indicative of the intention, a covenant may be joint, or joint and several, to or with the covenantors or covenantees, notwithstanding the interests are several. Salk. 393; 2 Roll. Abr. 419, [possibly should be 149; see 6 Queen's Bench, 971, note]. So they may be several, although the interests are joint. But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect. *Slingsby's case*, 5 Rep. 19; 3 Ch. R. 126; 5 T. R. 522; *Southcote v. Hoare*, 3 Taunt. 89; 1 Wood, 537; 2 Burr. 1190." In *Sorsbie v. Park*, 12 Mees. & Welsb. 152, (1843,) which was an action of covenant, the note of Mr. Preston being used by Mr. Temple, counsel for the plaintiff, Baron Parke said, "The words are to be construed to be several, if

is somewhat doubtful, but the better doctrine would seem to be, that a contract is to be construed, *first*, according to its

they are capable of it, and the interest be several; but if the words are joint, they cannot be so construed. That is what Mr. Preston means—where the words are *expressly* joint, the interest being several, cannot control them. I think you will find no case that goes so far as to say that the deed can be construed according to the interest, where the words are unambiguous, and not capable of more than one meaning.” Lord Abinger, in the judgment, says, “I think the rule is plain and certain, and requires no authority; it is correctly stated by Mr. Preston in the passage in *Shep. Touch.* which Mr. Temple has cited. Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant, and *vice versâ*. But there is no rule to say that words which are expressly a joint covenant, by several persons, shall be construed as a several covenant, unless there is something to lead to that construction. Where there are several parties, if the interest is joint, the covenant is construed as a joint covenant.” The next case is *Mills v. Ladbroke*, 7 Man. & Gray, 218, (1844,) where a several action was brought on a covenant in which the parties of the first part “severally covenant and agree with each of the parties of the third part,” &c., and it was contended that as the deed disclosed a contract of partnership, the action should have been brought in the joint names of all the parties—but this objection was overruled—and Chief Justice Tindal said, “The covenant, therefore, entered into by the defendant, as representing Kingscote with the shareholders, is, in point of form, not a covenant with all the covenantees jointly, but a several covenant with each. And we think this is so clearly the case, that, if the general rule, as laid down by Sir Vicary Gibbs in *James v. Emery*, 8 Taunt. 245; 5 Price, 533, is qualified according to the suggestion of Mr. Preston, in a note to *Sheppard’s Touchstone*, p. 166, which was adopted by the Court of Exchequer in the case of *Sorsbie v. Park*, 12 M. & W. 146, all reference to the nature of the plaintiff’s interest would be unnecessary.

“But, assuming, on the authority of the several cases referred to in the argument, that the unqualified rule of law is, that the action shall follow the nature of the interest of the covenantees, without regard to the precise form of the covenant, so that the action must be joint where the interest in the subject-matter of the covenant is joint, and several where the interest of each covenantee is a several interest, we think, upon reference to the deed itself, the plaintiff has such several interest in the subject-matter as will enable him to sue alone on this several covenant.” This case, it will be seen, while it does not distinctly support Mr. Preston’s doctrine, indicates an inclination to do so. The facts of the case did not render it necessary to decide the question.

express words, if they be clear and unambiguous, and not according to the interest of the parties where it conflicts with

The next case in which this doctrine is adverted to is *Hopkinson v. Lee*, 6 Adolph. & Ell. N. S. 964, (1845). This was an action of covenant on a deed of trust, executed between the plaintiff and J. H. of one part, and the defendant of the other. The material clause of the deed recited a loan in consideration of which, the defendant and T. "severally and respectively, and for their several and respective heirs, &c., covenant, promise, and agree with and to the said J. H. (the plaintiff) his executors, &c., and also as a *distinct* covenant with and to the said A. C. H., (the *cestui que trust*,) her executors," &c. And it was held that the *cestui que trust* ought to have been joined. Lord Denman, in his judgment, gives the weight of his authority against the distinction by Mr. Preston and the rule of the Exchequer court. He says, "The question is whether a nonsuit ought to be entered on account of the action being brought by the plaintiff only, when the covenant is, in contemplation of law, made by the defendant with the plaintiff and Ann Caroline Hogg jointly. That it is so made is argued from the authority of a very long series of cases, of which *Slingsby's case* (5 Rep. 18*b*) is the leading one, though by no means the oldest; a case the more entitled to respect, because it is founded on a principle the reason of which is adopted and sanctioned in *Anderson v. Martindale* (1 East, 497) by Lord Kenyon, whose comment upon it, and whose consequent decision received the silent acquiescence of the whole court. This case does not appear to have been overruled or questioned. It was acted upon in the Court of Error over which Gibbs, C. J. presided in 1818; *James v. Emery* (5 Price, 529; s. c. 8 Taunt. 245). The same rule is laid down by Sheppard, in the *Touchstone*, 166.

"But the last very learned editor, Mr. Preston, has there originated a doubt whether it is not expressed too generally. He refers to several cases, none of which impugn or qualify the rule, and (which is truly remarkable) does not even name *Anderson v. Martindale* (1 East, 497). Mr. Preston introduces an exception not grounded on any judicial authority, namely: That the covenant must be ambiguous, before that which is, *primâ facie*, either joint or several, can be properly construed as several or joint according to the interest of the covenantees. He cites Salk. 393, (*Robinson v. Walker*, 1 Salk. 393, which gives no countenance to the exception,) and 2 Roll. Ab. 419, which relates to a wholly different matter. [We have looked into 1 Roll. Ab. 419, which is under the head *Condition*, and 519, under that of *Covenant*; in neither place does this doctrine appear. *Probably the reference intended by Mr. Preston is to 2 Roll. Ab. 149, Obligation*, (4)]. Mr. Preston thus concludes his observations: 'The general rule proposed by Sir Vicary Gibbs, and to be found in several books, would establish, that there was a rule of law too powerful to be controlled by any intention, however express.' But we think there is no

such terms; second, according to the *interest*, where the words are ambiguous and susceptible of different constructions. If,

ground for Mr. Preston's apprehension that words perfectly plain and unambiguous, confining the contract expressly to one person and excluding all others from its operation, will be strained by the law so as to comprehend those whom it took pains to exclude. The true explanation of the rule is rather this: That the whole covenant taken together binds to both covenantees, and not to either of them alone, though separately named in some of its words, by reason of the joint interest in the subject-matter of the action appearing on the face of the deed itself.

"Such being the state of the authorities, a special case (*Sorsbie v. Park*, 12 M. & W. 146) was reserved from the assizes for the Court of Exchequer, where certain persons with whom a covenant had been made, sued the covenantors upon it. The deed, being fully set out, was found to make a covenant with the plaintiffs for themselves *and others*; and in Michaelmas term, 1843, the court held, in strict conformity with all the cases, that a nonsuit ought to be entered, because those others had not been joined as plaintiffs in bringing the action, though the covenant declared on was in its terms made with them alone. But the plaintiff here places his whole reliance on some dicta which fell from the late Chief Baron and from Parke, B., applicable, not to that case, but only to the converse of it, which were represented as at variance with the old law. Unluckily, no reference was made to *Anderson v. Martindale*, (1 East, 497,) as the court, justly thinking the general rule too clear for argument, stopped the learned counsel who supported it. Lord Abinger thought the rule plain and certain, and that it required no authority; 'it is correctly stated by Mr. Preston;' he then cites the rule with the exception. (Patteson, J., observed, during the argument of the present case, that the words 'by several persons,' in the judgment of Lord Abinger, 12 M. & W. 157, line 8, should be read 'to several persons.') Parke, B., also thinks the correct rule is laid down by Gibbs, C. J., in *James v. Emery*, (5 Price, 533,) with the qualification stated by Mr. Preston. These learned judges could not intend to overrule *Anderson v. Martindale*, (1 East, 497,) which was not brought before them; nor, if they did, could we agree to be bound by their extrajudicially declaring such an intention where their decision itself pursued the doctrine of that case."—The question was again discussed in the subsequent case of *Bradburne v. Botfield*, 14 Mees. & Welsb. 559, (1845,) and Baron Parke still adhered to the views taken by the Court of Exchequer in the cases previously cited. "There is no occasion, (he says,) to refer to the cases relating to the rule of construction as to covenants being joint or several according to the interest of the parties, which is perfectly well established. In the case of *Sorsbie v. Park*, 12 M. & W. 146, Lord Abinger and myself, on referring to the established rule, as laid down by Lord Chief Justice Gibbs in the

therefore, the contract be made expressly joint, and nothing be said indicating an intention to make it several, it is to be con-

case of *James v. Emery*, 2 Moore, 195, (E. C. L. R. vol. 4,) approved of Mr. Preston's qualification and explanation of it in his edition of the *Touchstone*, 166, namely, that, if the language of the covenant *was capable of being so construed*, it was to be taken to be joint or several, according to the interest of the parties to it. Mr. Preston adds, that the general rule proposed by Sir Vicary Gibbs, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by *any intention, however express*; and I consider such qualification to be perfectly correct, and at variance with no decided case, as it is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one. I mention this because the Court of Queen's Bench, in the case of *Hopkinson v. Lee*, 14 Law J. (N. S.) Q. B. 104, have supposed that Lord Abinger and myself had sanctioned some doctrine at variance with the case of *Anderson v. Martindale*, and *Slingsby's* case, which it was far from my intention, and I have no doubt from Lord Abinger's, to do; it being fully established, I conceive, by those cases, that one and the *same* covenant cannot be made both joint and several with the covenantees. It may be fit to observe, that a part of Mr. Preston's explanation, that, by express words, a covenant may be joint *and* several with the covenantors and *covenantees*, notwithstanding the interests are several, is inaccurately expressed: it is true only of covenantors, and the case cited from *Salkeld*, p. 393, relates to *them*: probably Mr. Preston intended no more, and I never meant to assent to the doctrine that the *same* covenant might be made, by any words, however strong, joint and several, where the interest was joint; and it is this part, I apprehend, of Mr. Preston's doctrine to which the Court of Queen's Bench objects. I think it right to give this explanation, that it may not be supposed that there is any difference on this point with the Court of Queen's Bench.' The next case was that of *Keightley v. Watson*, 3 Exchequer R. 716, (1819,) in which the Court of Exchequer reaffirmed the doctrine of *Sorsbie v. Park*. This was an action of covenant on a deed executed by Dobbs of the first part, the plaintiff of the second part, and the defendants of the third part. The action was brought by the plaintiff alone, without making Dobbs a party. The material covenant on which the discussion rose was this: "And the defendants, for themselves, their heirs, &c., hereby covenant with the said plaintiff, his executors, &c., and as a *separate covenant* with the said Dobbs, his executors, &c., that they, the said defendants, and their heirs, &c., shall," &c. It was held that the plaintiffs might properly sue *alone*, the covenant being several. Pollock, C. B., said, "I am of opinion that in this case the plaintiff is entitled to the judgment of the court. I con-

strued as solely joint. If, by its terms, it be both joint and several, it may be treated as either according to the *interest of*

sider that the inquiry really is as to the true meaning of the covenant, at the same time bearing in mind the rule—a rule which I am by no means willing to break in upon—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint, if the interest be joint, and it will be several, if the interest be several. On the other hand, if it be in its terms *unmistakably* joint, then, although the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, although the interest be joint. It is a question of construction. What then, in this case, did the parties mean? The words of the covenant are, ‘And the said R. Watson, H. Watson, and J. Smith, for themselves, their heirs, executors, administrators, and assigns, and as a *separate* covenant with the said A. A. Dobbs, his executors, administrators, and assigns, that they,’ will do so and so. If I am to put a construction upon that, I should say that it is intended to be a several or separate covenant. In the case of *Hopkinson v. Lee*, it seems to have been understood at one time by this court that there were joint words. There are certainly none. But the nature of the interest, upon looking into that particular case, may possibly justify that decision. The words of this instrument are several, and its terms disclose a several interest; the covenant, therefore, must be construed according to the words, as a several covenant, and it appears to me that the words used by the parties were intended to create such a covenant. I think, therefore, that the plaintiff is entitled to sue alone.” Parke, B., said, in the course of his opinion, “The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interests of the parties which they intended to protect, and construe the words according to that interest. I apprehend that no case can be found at variance with that rule, unless *Hopkinson v. Lee* may be thought to have a contrary aspect. During the course of the argument in *Bradburne v. Botfield*, I certainly was under the impression, from reading the case of *Hopkinson v. Lee*, that there were in that case words capable of such a construction as to make the covenant a joint covenant. If that had been so, then the words subsequently introduced, would not have made it several, unless there had also been an

the parties in order to subserve the purposes of justice. If it

interest in respect of which it could be several, according to the rule referred to by the Lord Chief Baron, as laid down in *Slingsby's* case, that it is not competent to the court to hold the same covenant joint or several at the option of the covenantee." Baron Rolfe and Baron Platt concurred, and the former gave the following opinion: "It seems to me that the question turns entirely upon the rule, as stated by my Brother Parke, which was distinctly laid down by this court in the cases cited, and in which I fully concur. It appears to me, that Mr. Preston's suggestion was perfectly well founded, that the rule in *Slingsby's* case was not a rule of law, but a mere rule of construction. From that case it appears, that, if a covenant be *cum quolibet et qualibet eorum*, that may be either a joint or several covenant, and it will depend upon the context whether it is to be taken as a joint or several; but it cannot be both. The rule given in *Slingsby's* case is not very satisfactory to my mind, namely, with regard to the difficulty which arises as to the proper person to recover damages. If a party choose to enter into a covenant which creates such a difficulty, I do not see what the court has to do with it. It is clear that parties can so contract by separate deeds; why, then, should they not be able equally to do so by separate covenants in the same deed? If they so word one covenant as to make it a joint and separate covenant, had it not been otherwise decided, I confess I should have seen nothing extraordinary in holding, that if they choose so to contract as to impose upon themselves that burden, and state it to be both joint and several, the court ought so to construe it. But *Slingsby's* case has laid down the opposite rule. I take it, that from that time the rule has always been — whether distinctly expressed or not, it is not necessary to consider — but the rule has been, that you are to look and see from the context what the parties meant. Applying that rule here, I see no doubt about the question. They have said in terms, that it is to be a separate covenant. According to the other construction, if Dobbs had satisfied Keightley, and Dobbs had died, Keightley might have to sue for the money coming to Dobbs, or *vice versâ*: or suppose Dobbs had not satisfied Keightley, and Keightley died, Dobbs would have had to sue for the money coming to Keightley's representatives. It is clear that is not what the parties meant. They have expressed themselves in words showing it was to be a separate covenant with each, and I think we should so hold it; consequently the plaintiff is entitled to our judgment." See also *Sharp v. Conkling*, 16 Vt. 354; *Catlin v. Barnard*, 1 Aiken, R. 9; *Jones v. Robinson*, 1 Excheq. R. 454; *Palmer v. Sparshott*, 4 Man. & Gr. 137; *Boggs v. Curtin*, 10 Serg. & Rawl. 211. In this case two firms gave their joint and several note to A., and it was held, that on payment of the note by them they could not maintain a joint action against A., it not appearing that the payment was made out of a joint fund of the two firms. Gibson, J., in his judgment, said, "The action of assumpsit

be several in express terms, it must be so treated, though the

must be joint or several, accordingly as the promise on which it is founded is joint or several. Where the promise is *express*, there can be little difficulty in determining to which class it belongs, as its nature necessarily appears on the face of the contract itself; and if it be joint, all to whom it is made must, or at least may sue on it jointly. . . . But an *implied* promise, being altogether ideal, and raised out of the *consideration* only by intendment of law, follows the nature of the consideration; and as that is joint or several, so will the promise be." — In the case of *Foley v. Addenbrooke*, 4 Adol. & Ell. 207, it is held, that not only the interest but the *cause* of action must be *joint*; and this case must be regarded as an explanation of the doctrine asserted by Lord Denman in *Hopkinson v. Lee*, cited above. The judgment was delivered two years before, (1843). Lord Denman says, "We are of opinion that, the demise being joint, and the covenants upon which the action is brought entire, and made with both the lessors, *the cause of action is joint*, and that both the covenantees ought to sue; though, as between themselves, their interests may be separate. Several cases were cited upon the argument; *Anderson v. Martindale*, (1 East, 497); *James v. Emery*, (8 Taunt. 245); *Kitchen v. Buckley*, (1 Lev. 109); *Harrison v. Barnby*, (5 T. R. 246); *Eccleston v. Clipsham*, (1 Saund. 153), and others which it is not necessary more particularly to refer to. But the result of the cases appears to be this, that, where the legal interest *and cause of action* of the covenantees are *several*, they should sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear, as in the case of covenants to pay *separate rents* to tenants in common upon demises by them; or, as in the instance cited from *Slingsby's case*, (5 Rep. 18 *b*.) in note (1) to the case of *Eccleston v. Clipsham*, (1 Wms. Saund. 155,) where a man by indenture demised Blackacre to A., Whiteacre to B., and Greenacre to C., and covenanted with them, and each of them, that he had good title, each might maintain an action for his particular damage by a breach of that covenant. On the other hand, it appears from several cases, that *if the cause of action be joint*, the action should be joint though the *interest* be several. *Coryton v. Lithebye*, (2 Saund. 115); *Martin v. Crompe*, (1 Ld. Raym. 340); *Wilkinson v. Hall*, (1 New Ca. 713). In the present case, the covenants for breach, of which the action is brought, are such as to give the covenantees a *joint interest in the performance of them*: and the terms of the indenture are such that it seems clear that the covenantees *might* have maintained a joint action for breach of any of them. Upon this point the case of *Kitchen v. Buckley*, (1 Lev. 109,) is a clear authority; and the case of *Petrie v. Bury*, (3 B. & C. 353,) shows that, if the covenantees *could* sue jointly, they are bound to do so."

interests be joint.¹ A distinction is, however, to be taken in this respect between covenantors and covenantees, for although a covenant may by express words be made both joint and several as to covenantors, notwithstanding the severalty of the *interests*, it would not be so as to covenantees. If, therefore, a joint and several covenant be made by covenantors, they would be severally liable if the interests was several.² But the same covenant cannot be both joint and several as to covenantees, and if the interest be joint, a joint action must be brought.³ Yet, if there be two different covenants in the same contract, one joint and several and the other several, the covenantee might bring a separate action against one, provided the subject-matter of the covenants were not the same, and not otherwise.⁴

¹ *Mills v. Ladbroke*, 7 Man. & Gray, 718; *Place v. Delegal*, 4 Bing. N. C. 426; *Hall v. Leigh*, 8 Cranch, R. 50; *Poole v. Hill*, 6 Mees. and Welsb. 835; *Seaton v. Booth*, 4 Adolph. & Ell. 528; *Wilkinson v. Hall*, 1 Bing. N. C. 713.

² *Bradburn v. Botfield*, 14 Mees. & Welsb. 559; *Robinson v. Walker*, 1 Salk. R. 393; *Keightley v. Watson*, 3 Exchequer R. 716; 1 Wms. Saunders, R. 154, note 1; *Enys v. Dennilhorn*, 2 Burr. 1190.

³ *Bradburn v. Botfield*, 14 Mees. & Welsb. 559; *Hopkinson v. Lee*, 6 Adolph. & Ell. N. S. 971; *Byrne v. Fitzhugh*, 1 Cr. Mees. & Rosc. 613; *Hatsall v. Griffith*, 4 Tyrw. R. 487; *Petrie v. Bury*, 3 Barn. & Cres. 353; *Southcote v. Hoare*, 3 Taunt. R. 87; *Slingsby's case*, 5 Co. 18 b.; *Anderson v. Martindale*, 1 East, R. 497; *Sweigart v. Berk*, 8 Serg. & Rawle, 308; *Dob v. Halsey*, 16 Johns. R. 34; *Sims v. Harris*, 8 B. Munroe, R. 55; *Tapscott v. Williams*, 10 Ohio R. 442; *Foley v. Addenbrooke*, 4 Barn. & Adolph. 207, 208.

⁴ *Duval v. Craig*, 2 Wheat. R. 45. In this case there were two distinct covenants in the same instrument. Mr. Justice Story in delivering the judgment of the court, says, "It is contended that the two covenants in the deed are so knit together, that they are to be construed in connection, so that the clause as to an indemnity with other lands, in case of an eviction by a prior legal claim, is to be applied as a restriction to both covenants; and if so, then the action cannot be sustained, for the declaration does not allege any eviction, or any demand or refusal to indemnify with other lands. There is certainly considerable weight in the argument. It is not unreasonable to suppose that when the parties had provided a specific indemnity for a prior claim, they might mean to apply the same indemnity to all the other cases enumerated in the first covenant. But something more than the mere reasonableness of such a supposition must exist to authorize a court to adopt such a construction. The cove-

§ 33c. Where the subject-matter of the contract is entire, as if it be to pay a whole sum to several parties, it is solely joint, and no one can bring a separate action for his share.¹ Nor will the mere fact that the share of each is stated, give a separate right of action, if the intention be to pay only one sum *in solido*.² Thus, where the defendant covenanted with the plaintiff and one A. B. to pay the plaintiff and the said A. B. one annuity or clear yearly sum of £30 "in the shares and proportions following," namely, the sum of £15, being one moiety of the said annuity or yearly sum, to the plaintiff, &c., and the sum of £15, the remaining moiety thereof, to the said A. B., "it was held that the covenantees had a joint and not a several interest;"³ the sum being, throughout the deed,

nants stand distinct in the deed, and there is no incongruity or repugnancy in considering them as independent of each other. The first covenant being only against the acts and incumbrances under the parties to the deed, which, they could not but know, they might be willing to become responsible to secure its performance by a pecuniary indemnity; the second including a warranty against the prior claims of strangers also, of which the parties might be ignorant, they might well stipulate for an indemnity only in lands of an equivalent value. The case ought to be a very strong one, which should authorize a court to create, by implication, a restriction which the order of the language does not necessarily import or justify. It ought to be one in which no judicial doubt could exist of the real intention of the parties to create such a restriction. It cannot be pronounced that such is the present case; and this objection to the declaration cannot, therefore, be sustained." See also *Sorsbie v. Park*, 12 Mees. & Welsb. 146; *Keightley v. Watson*, 3 Exchequer R. 716; *Bradburn v. Botfield*, 14 Mees. & Welsb. 559, 572; *Sharp v. Conkling*, 16 Verm. R. 354; *Foley v. Addenbrooke*, 4 Adolph. & Ell. N. S. 207.

¹ *Lane v. Drinkwater*, 1 Crompt. Mees. & Rosc. 613; *Winterstoke Hundreds Case*, Dyer, 370 a, p. 59; *May v. May*, 1 Car. & Payne, 44; *English v. Blundell*, 8 Ibid. 332; *Osborne v. Harper*, 5 East, R. 229.

² *Lane v. Drinkwater*, 1 Crompt. Mees. & Rosc. 599; *Byrne v. Fitzhugh*, 1 Ibid. 613; *Osborne v. Harper*, 5 East, R. 229; *Foley v. Addenbrooke*, 4 Adolph. & Ell. N. S. 208.

³ *Lane v. Drinkwater*, 1 Crompt. Mees. & Rosc. 599. Mr. Baron Parke says, "Upon referring to the deed set out on oyer, it appears to us, that it is a grant of and covenant to pay one *entire annuity* of £30 *per annum* to the plaintiff and Billing, one moiety of which is to be received by each, and not a grant of, or covenant to pay two several annuities of £15 to the plaintiff and Billing

treated as *one* annuity, and not as two. So, also, where different sums of money are contributed by several persons, and the amount raised is advanced as one total sum, the action for repayment should be jointly brought.¹

33*d.* But if the agreement be to pay to each covenantee a specific sum, or to perform distinct and separate duties to each of the obligees, the contract would be treated as several.² Thus, where the defendant promised one Thomas that, in consideration of the surrender of a copyhold, he would pay to his (Thomas's) two daughters, £20 apiece, it was held, that the promise was several, and as the parties had distinct interests, every one of them could bring the action.³ So, also, where the defendant was master of a vessel, and covenanted with the

respectively. Throughout the deed it is called *one* annuity; it is granted in consideration of a sum paid by both; it is secured by a warrant of attorney to confess a joint judgment at the suit of both, by a grant to both of the reversion of a close of land, and of a sum of money in the funds, with a joint power of attorney to recover it; and on seven days' notice to both, both covenant to receive one entire sum in full for the annuity, and, on receipt thereof, and of the arrears, to deliver up the deed to be cancelled. We, therefore, think that it is but *one* annuity, and the covenant with two to pay it in moieties, is a joint covenant. We do not mean to say, that, if the deed had contained two distinct grants of two several annuities to the plaintiff and Billing, the circumstance of these annuities being collaterally secured by joint grants and authorities, or even redeemable by one joint payment, would have made the covenant with both to pay these annuities a joint covenant; but, when we find express words describing it as *one* annuity, coupled with these provisions, we cannot doubt as to the effect of the deed. We, therefore, think that the interest in this case is in effect a joint interest in one entire annuity; and, consequently, the words of the covenant with the plaintiff and Billing must be taken in their ordinary sense, and constitute a joint covenant, on which the plaintiff alone cannot sue, and the judgment must therefore be arrested." But see *Shaw v. Sherwood*, Cro. Eliz. 729.

¹ *May v. May*, 1 Car. & Payne, 44; *Evans v. Draper*, 1 Roll. Abr. 31, pl. 9; *Saund.* 116, n. a.

² *Brand v. Boulcott*, 3 Bos. & Pul. 235; *Palmer v. Sparshott*, 4 Scott, N. R. 743; *Owston v. Ogle*, 13 East, R. 538; *Hall v. Leigh*, 8 Cranch, R. 50; *Shaw v. Sherwood*, Cro. Eliz. 729; *Withers v. Bircham*, 3 Barn. & Cres. 254.

³ *Thomas v. —*, Styles, R. 461.

plaintiff and others, part owners, and their *several* and *respective* executors, administrators, and assigns, to pay certain moneys to them and to every of their several and respective executors, &c., and in such parts and proportions as were set against their several and respective names, it was held, that the covenant was several, and each covenantee should have brought a separate action.¹ The question in all of these cases, however, depends upon the intention of the parties, and this is to be gathered from an examination of all the circumstances of the case. If it clearly appear that a several liability was intended, the contract will be construed so as to agree with such intention, and not strictly according to any strict technical rule.²

¹ *Servante v. James*, 10 Barn. & Cres. 410. Mr. Justice Bayley, in this case, thus states the ground of this judgment: "The covenants in question are made with the several part owners of the vessel and their *several and respective executors*, administrators, and assigns; which latter words would be quite inoperative if the right to sue were in all the parties jointly. Again, the covenant to pay the money is not to pay it to the owners generally, but to pay it to them and their and every of their several and respective executors, &c., at a certain place in such parts and proportions as were set against their several and respective names. He was not to pay it so that the banker might make distribution, but was to make the distribution himself; and if he paid in the proportions of some and not others, each of those would be injured in respect of the non-payment of his share. In case of the death of one part owner, by the words of the covenant his personal representative might sue. If the covenant were joint, the executor of the survivor only could maintain an action; but such a construction would be quite at variance with the words *their several and respective executors*, &c. Again, if the covenant were joint, a release by any one would defeat an action brought by all, an inconvenience that the several parties might wish to avoid. For these reasons I think that the language of the covenant is several, and that the interests of the parties are several, and consequently, that the action brought by all jointly cannot be maintained."

² *Peckham v. North Parish in Haverhill*, 16 Pick. R. 274. This was an action by a clergyman to recover his salary, against one of two corporations, by which he was jointly settled. Wilde, J., says, "There can be no doubt, we think, that in the call and settlement of the plaintiff as the minister of the parish, and the religious society in Plaistow, the two corporations acted jointly; but whether they jointly promised to pay his salary, is a question of no little difficulty. It must be determined, however, according to the true

§ 33 *e*. The same rule would apply to cases of tenants in common. If, therefore, they should make a lease reserving one entire rent to themselves, they could bring a joint action therefor, notwithstanding the rent were reserved "according to their several and respective rights and interests."¹ But if the

intent of the parties to the contract, and not strictly according to technical rules; for in the construction of all contracts, the situation of the parties, the subject-matter of their transactions, and the whole language of their instruments or stipulations, are to be taken into consideration, in determining the meaning of any particular sentence or provision. *Sumner v. Williams*, 8 Mass. R. 214. No particular language or phraseology, therefore, is necessary to make a contract joint, or joint and several. In all cases we must inquire what was the true intention of the parties. A contract may be binding upon several persons severally, although they do not so bind themselves in express terms. Thus in a case in *Dyer*, three were bound in an obligation, thus, 'we bind ourselves *et utrumque nostrum per se*,' and the bond was held good enough and several. *Dyer*, 19 *b*. So, where two bound themselves, or any of them, and the obligation was sealed and delivered by both of them jointly, it was held to be a joint and several bond. *Bac. Abr. Obligation*, D. 4.

"And so we apprehend that it cannot well be doubted, that two or more covenantors, or promisors, may make a contract, consisting of distinct stipulations, as to some of which they may covenant or promise jointly, and as to others separately.

"If two or more should make a conveyance of lands, and covenant jointly that they were seized; and a covenant were added, that in case the grantee should be evicted, each should pay a particular sum; we cannot doubt, that such covenants would be binding, the first being a joint, and the other a several covenant. So if two or more should contract jointly with another to build a block of houses or stores, they might severally promise each to pay such a particular sum as might be agreed upon by the parties. Such contracts, however unusual, are in no respect illegal, and the party suing for the breach of such a contract might have a joint or several remedy, according to the nature of the breach. Upon these principles, and considering the situation of the parties, and the votes and proceedings of the two corporations, we are of opinion, that their promises to pay the plaintiff's salary were several, and that each is liable severally for the portion they agreed to pay respectively." See also *Owsten v. Ogle*, 13 East, R. 538.

¹ Lit. § 316; 2 Black. Comm. ch. 13, IV.; *Simpson v. Clayton*, 4 Bing. N. C. 781; *Tindal*, C. J. says, in this case, "No case appears to have laid it down that tenants in common *must* join in an action of covenants; the utmost that has been established seems to be that tenants in common *may* join in these ac-

contract be for separate rents, there must be separate actions.¹ So, if there be no joint demise, as if a moiety of the premises be held under one tenant, and a moiety under the other, there must be several actions for the rent.²

§ 33 *f.* In contracts of guaranty or suretyship, co-sureties may be either jointly or severally liable according to the terms of their contract, but the surety is not jointly liable with the principal, his undertaking being collateral and secondary.³ In respect to co-sureties, it is not necessary, in order to create a joint liability, that each should have a separate seal, provided it appear that the seal affixed was intended to be adopted as the seal of all.⁴

tions of covenant which are merely personal and several in damages only, as on the covenant to repair." 1 Lev. 109; Raym. 80. See also *Wallace v. McLaren*, 1 Man. & Ryl. 516.

¹ In *Powis v. Smith*, 5 Barn. & Ald. 851, Abbott, C. J., says, "It is clear that if there be a joint lease by two tenants in common, at an entire rent, the two may join in an action to recover the same, but if there be a separate reservation to each, then there must be separate actions." See also *Foley v. Addenbrooke*, 4 Adolph. & Ell. N. s. 208; *Midgeley v. Lovelace*, Carth. R. 289.

² *Wilkinson v. Hall*, 1 Bing. N. C. 718; *Cutting v. Derby*, 2 W. Black. R. 1077.

³ *De Ridder v. Schermerhorn*, 10 Barb. S. C. R. 640; *Hall v. Farmer*, 2 Comst. R. 553.

⁴ In *Van Alstyne v. Van Slyck*, 10 Barb. S. C. R. 387, it is said by the court: "But it is objected that there was but one seal, and that, therefore, both defendants cannot be jointly liable in covenant. The oyer shows but one seal, and that is opposite the signature of Van Slyck, the first signer: Where there are several persons executing a deed, it is not necessary to affix a separate seal for each, provided it appear that the seal affixed was intended to be adopted as the seal of all. (Perkins, 59, § 134; Sir Wm. Jones's Rep. 268; 1 Dall. Rep. 63; 3 Monroe, 376; 2 Dev. 493.) It was so held, where a deed was executed by an attorney for several persons. (*Townsend v. Hubbard*, 4 Hill, 354.) And where one or two partners executed a bond to which he subscribed the name of the firm, and affixed one seal, the other partner having previously read and approved the bond, and consenting that his copartner should execute it for both, and being in the store at the time of its execution, though it was not actually signed and sealed in his immediate

§ 33 *g*. Co-trustees and co-executors are generally liable only severally and not jointly for the acts of each other, and if a trustee sign a receipt jointly with his co-trustee, he may, by showing that he did not receive the money, avoid all personal liability, at least in equity.¹ But the same rule does not apply to a joint receipt by co-executors.²

§ 33 *h*. Where a promissory note or other unsealed instrument is signed by one person, and it appears on the face of the instrument itself, that he signs as agent for other persons, naming them, he will not render himself severally liable thereon. Thus, where a partner signed a promissory note with his own name, "for A. B. C." his partners, it was held that the firm were liable solely, and the mere fact that the note commenced with the words "I promise to pay" would not render the instrument several.³ But if a note commencing, "I promise to

presence; this was held a good execution of the bond, so as to make it the deed of both. (*Mackay v. Bloodgood*, 9 Johns. 285.) In *Bull v. Dunsterville*, (4 Term Rep. 313,) A. executed a deed for himself and his partner, by the authority of his partner, and in his presence; it was held a good execution of both, though only sealed once. In *Flow v. Yandes*, (1 Black. 102,) it was held that two persons may make use of one seal in the execution of a bond, and it will be the deed of both. The case of *Stabler v. Cowman*, (7 Gill. & Johns. 284,) is, perhaps, more like that under consideration. It is there said, the same contract may be the specialty of one, and the parol agreement of another; and such is this case, if the seal affixed is that of Van Slyck alone, and not of Garner. In *Stabler v. Cowman*, it is also held, that where there is but one seal to a contract, it is presumed to be the seal of the party whose signature is prefixed to it; but upon proof of its being made by the authority of the other parties to the contract, it will be held to be their seals respectively."

¹ See post, § 304; 2 Story, Eq. Jurisp. § 1280, 1281; *Fellows v. Mitchell*, 1 P. Williams, R. 83, and Cox's note.

² Post, § 302, § 304; *Saddler v. Hobbs*, 2 Bro. Ch. R. 114.

³ The opposite doctrine was laid down in *Hall v. Smith*, 1 Barn. & Cres. 409, on the authority of the old cases of *Marsh v. Ward*, Peake, R. 177, and *Clark v. Blackstock*, Holt, R. 474; but this case has been expressly overruled by the Court of Exchequer in the case of *Ex parte Bulkley*, 14 Mees. & Welsb. 473. Baron Parke, in the judgment in that case says, "This is *primâ facie* a promise by one partner for himself and the other three partners, and it amounts to one promise of the four persons constituting the firm; and if Mitch-

pay," be signed by two persons, and nothing appear to indicate partnership or other joint liability, the note would be joint and several.¹ But where the instrument is sealed and signed by one person with his own name and seal, he would be severally liable, although it should appear that he was acting as agent or attorney.²

33 i. Where there is no written contract, but the agreement is one of implication from the subject-matter and the circumstances of the case, the nature of the consideration affords the true criterion by which to determine whether the contract is joint or several. If the consideration moving from several persons be entire and single, the contract is joint, and all must sue. If there be distinct considerations moving from each of the persons individually, the contract is several.³ Thus, if

ell had authority, the firm is bound. I really must say that I think *Hall v. Smith* cannot be supported. The partner in making the promise, is only an agent for the firm. Then does it bind him personally, or does it bind the firm? No doubt the instrument was intended to bind the firm; and as he had authority as a partner to do it, it had that effect. I think we must certify our opinion to the Lord Chancellor, that there was no separate right of action against Mitchell upon any of these notes." See also *Story on Partnership*, 144, in which Mr. Justice Story says, that the doctrine in the case of *Hall v. Smith* "goes to the very verge of the law, and perhaps may be thought to deserve further consideration." *Van Alstyne v. Van Slyck*, 10 Barb. S. C. R. 387; *Bull v. Dunsterville*, 4 T. R. 313.

¹ *Hemmenway v. Stone*, 7 Mass. R. 58. See also *March v. Ward, Peake*, R. 177; *Clark v. Blackstock*, Holt, R. 474; *Sayer v. Chaytor*, 1 Lutwyche, 696; *Van Alstyne v. Van Slyck*, 10 Barb. S. C. R. 387.

² *Townsend v. Hubbard*, 4 Hill, R. 351; *Van Alstyne v. Van Slyck*, 10 Barb. S. C. R. 387; *How v. How*, 1 New Hamp. R. 49; *Copeland v. Mercantile Ins. Co.* 6 Pick. R. 198. In *New Eng. M. Ins. Co. v. De Wolfe*, 8 Pick. R. 61, Parker, J., says, "The authorities cited to maintain the position, that the name of the principal must be signed by the agent, are of deeds only; instruments under seal; and it is not desirable that the rigid doctrine of the common law should be extended to mercantile transactions of this nature, which are usually managed with more attention to the substance than to the form of contracts."

³ *Bell v. Chaplain, Hardres*, 321; *Jones v. Robinson*, 1 Excheq. R. 454; *Smith v. Hunt*, 2 Chitt. R. 142; *Winterstoke Hundreds Case*, Dyer, R.

several persons be employed at the same time to do a certain work together for a whole sum, the contract is joint; but if the parties be retained to do separate parts of the work, or if there be a separate agreement with each, the contract would be several.¹ So, also, where, in a joint action brought by two persons as plaintiffs, it appeared that several cattle had been distrained, some belonging to one and some to the other, and that the defendant, in consideration of £10 paid to him by the plaintiff, had promised to get the cattle restored to them, it was held that, as the consideration was joint, the action was properly brought jointly.²

§ 33 *j*. In contracts which are not reduced to writing, the court will look into the special circumstances of the case, and the situation of the parties as well as into the consideration itself, in order to determine whether the interest be joint or several, and how the action should be brought; and if the parties have, by their acts, manifested an intention to treat the contract as several and not as joint, it will be so held to be. Thus, if two joint owners of merchandise consign it to a merchant for sale, and inform him that each one owns one moiety, and give separate and different instructions each for his own moiety, it will be treated as a several contract, and one of the consignors alone may maintain a separate action against the consignee for violation of his instructions.³ So, also, if the circumstances indicate distinct and separate interests, the contract will be treated as several. Thus, where the plaintiff and his two partners employed the defendants as accountants for hire to make out the accounts of the firm, and of the *separate balance* of each partner, and the defendants made out the plaintiff's sep-

pl. 59, 370 *a*; *Hatsell v. Griffith*, 4 Tyr. R. 487; *Hall v. Leigh*, 8 Cranch, R. 50; *Lane v. Drinkwater*, 5 Tyr. R. 40; *Chanter v. Leese*, 5 Mees. & Welsb. 701.

¹ *Smith v. Hunt*, 2 Chitt. R. 142; *Story v. Richardson*, 4 Bing. N. C. 123.

² *Joans v. Draper*, 1 Roll. Abr. 31, pl. 9; *Styles*, 156, 157, 203; *Saund.* 116, n. a.

³ *Hall v. Leigh*, 8 Cranch, R. 51.

arate balance so erroneously and negligently, that, relying on their statements, he was a considerable loser thereby, it was held that the plaintiff might sue alone for this misfeasance.¹ On the other hand, if the nature of the case manifestly indicate joint interests, no several right of action will be supported. Where, therefore, several persons jointly retain and employ one person to do a single act for the benefit of all, the contract will be joint, although they may have several beneficial interests, or be possessed of several shares in the subject-matter of the contract. Thus, where the plaintiff and two other persons owning separate shares in a ship, employed the defendant to sell the entirety for them, it was held that the plaintiff could not sue the defendant for his separate share of the purchase-money, for the engagement being to sell the entire ship, the proceeds all became joint property ; but if each owner had employed the defendant to sell his particular share, separate actions might be brought by each.²

§ 33 *k*. Where a contract is joint and several, the plaintiff must sue each party severally, or make joinder of them all, and he could not maintain an action against two of three parties under such a contract.³

§ 33 *l*. Where a release under seal is given to one of joint,

¹ *Story v. Richardson*, 6 Bing. N. C. 123. In his judgment in this case Mr. Justice Maule says, "I am of opinion that no variance has been made out, for the case affords ample evidence of a separate retainer by the plaintiff. In a case of disputed partnership accounts, the firm agrees that the defendants shall be employed by the firm, and by each of them separately, to settle the accounts, and to make out the balance belonging to each. The duty of the defendants must be inferred from the nature of the thing to be done: there was a contract between the defendants and each of the partners, as well as a contract between the defendants and all. Whether, from such a contract, a duty arises which may be the subject of an action *ex delicto*, is a question which arises on the record, but does not call for decision now."

² *Hatsall v. Griffith*, 2 Crompt. & Mees. 679. See also *Hill v. Tucker*, 1 Taunt. R. 7.

³ *De Ridder v. Schermerhorn*, 10 Barb. S. C. R. 640 ; 1 Chit. Pl. 30 ; *Stratfield v. Halliday*, 3 T. R. 782.

or joint and several debtors, it operates as a discharge of all.¹ Nor would the effect of such a release be altered by parol evidence, that it was given to one obligor at the express request of the other, who thereupon agreed that he should still remain liable, — on account of the technical rule of law that an instrument under seal cannot be varied by parol averment.² But where the release is not under seal, it seems to be well settled in America, that it would not discharge all the obligors, it not being a technical release.³ In England, however, no such distinction seems to have been taken, and the effect of a release is held to be the same whether it be by instrument under seal or not.⁴ A covenant not to sue one of several joint, or joint

¹ *Cocks v. Nash*, 9 Bing. R. 348; *Brooks v. Stewart*, 9 Adolph. & Ell. 854; *Clayton v. Kynaston*, 2 Salk. R. 574; 2 Roll. Abr. 412; (G.) Pl. 4, 5; *Hammon v. Roll*, March, N. C. 202; *Lunt v. Stevens*, 24 Maine, (11 Shepley) 534; *Walker v. McCulloch*, 4 Greenl. R. 421; *Rowley v. Stoddard*, 7 Johns. R. 210; *Shaw v. Pratt*, 22 Pick. R. 308; *De Zeng v. Bailey*, 9 Wend. R. 336; *Harrison v. Close*, 2 Johns. R. 449; *Nicholson v. Revill*, 4 Adolph. & Ell. 683; *Cheetham v. Ward*, 1 Bos. & Pul. 633; *Parker v. Lawrence*, Hob. R. 70.

² *Brooks v. Stewart*, 9 Adolph. & Ell. 854; *Cocks v. Nash*, 9 Bing. R. 345. But suppose the action, instead of being brought on the original agreement, should in such case be brought in assumpsit on the new promise as creating a new contract or *novation*, the consideration of which was the release of the original obligors at the request of one of them, — would not the action be maintainable? See Chap. xvi. on *Novation*.

* *Shaw v. Pratt*, 22 Pick. R. 308. In this case Mr. J. Dewey says, "There is another objection entirely fatal to this defence, which we have more particularly considered. The instrument relied upon as a release of all the promisors of the note, is not under seal, and is not, therefore, a technical release. Nothing but a technical release under seal discharging one of several promisors, can operate to discharge the other promisors from their liability on the contract. This principle is well settled, and sustained by many adjudicated cases. *Walker v. McCulloch*, 4 Greenleaf, 421; *Harrison v. Close*, 2 Johns. R. 449; *Rowley v. Stoddard*, 7 Johns. R. 209; *De Zeng v. Bailey*, 9 Wendell, 336." See also *Lunt v. Stevens*, 24 Maine R. 534; *Seely v. Spencer*, 3 Verm. R. 334. But see *Milliken v. Brown*, 1 Rawle, R. 391.

* *Nicholson v. Revill*, 4 Adolph. & Ell. 675. This was an action of assumpsit on a joint and several promissory note, made by two parties, to one of whom subsequently, a parol release was given, and it was held that both makers were thereby discharged. Lord Denman said: "But we do not proceed on some of the grounds mentioned at the bar, such as the effect of the plaintiff's alteration

and several obligors, does not, however, discharge the other par-

of the instrument as making it void, or that the defendant thereby lost his right to contribution from the joint makers of the note; nor on any doctrine as to the relation of principal and surety. We give our judgment merely on the principle laid down by Lord Chief Justice Eyre in *Cheetham v. Ward*, 1 B. & P. 630, as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is a discharge of all. For we think it clear that the new agreement made by the plaintiff with Revill, to receive from him £100 in full payment of one of the three notes and in part payment of the other two, before they became due, accompanied with the erasure of his name from those two notes, and followed by the actual receipt of the £100, was in law a discharge of Samuel Revill.

"This view cannot, perhaps, be made entirely consistent with all that is said by Lord Eldon in the case *Ex parte Gifford*, 6 Ves. jun. 808, where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was not presented to his mind in its simple form; and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debtee might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord Eldon used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favor of the defendant." — The case of *Cheetham v. Ward*, upon the authority of which this judgment was founded, was an action of debt on a bond, brought by the executors of Abraham Cheetham against James Ward on a joint and several bond, given by the defendant and Wm. Ward, and it was pleaded that after the making of the bond Abraham Cheetham made Wm. Ward, one of the obligors, his executor, and he proved and took upon himself execution, whereby the debt was extinguished, and it was held that both obligors were discharged. It will be observed, therefore, that in this case the release was by operation of law on a sealed instrument, and therefore differs materially from the case of *Nicholson v. Revill*, which was a parol release, not a release by operation of law. Heath, J., said, "It is of no consequence whether the release be by operation of law or by deed demonstrating the intent of the party. For when the obligee releases to one as a matter of favor, that release affects both." Lord Denman did not, however, consider that there was any distinction between a simple parol release, and a release by operation of law, or by deed. In fact, no such question was raised. The cases in which this rule has been laid down

ties.¹ But it should clearly appear by the terms of the instrument itself, that it is not intended to operate as a release; for if it be clearly a release in form, parol evidence would be inadmissible to show that it was only intended to operate as a covenant not to sue.² Yet, if the contents of the instrument itself indicate such an intention, or be susceptible of such an explanation, it would be construed as a covenant not to sue, although words of release were used.³

§ 33 *m.* A release of one of two several obligors would not release the other; nor if there were separate covenants in an instrument, one of which related severally to one of

that a release of one obligor discharges all, are mostly cases where the release was under seal. It was so in *Clayton v. Kynaston*, 2 Salk. R. 574; *Lacy v. Kynaston*, 1 Lord Raym. 690; *Everard v. Herne*, Litt. R. 191; *Needham's Case*, 8 Rep. 136; *Cocks v. Nash*, 9 Bing. R. 348; *Brooks v. Stewart*, 9 Adolph. & Ell. 854. In *Hammon v. Roll*, March, R. 202, the release was by parol. So, also, it was in *Rex v. Bayley*, 1 Car. & Payne, 435; but the note for which the release was given, was a *joint* note solely. In *Parker v. Laurence*, Hob. R. 70, it was held that the nonsuit of one of two trespassers was a discharge of the other. But this doctrine has been since overruled. See *Mitchell v. Milbank*, 6 T. R. 200; *Dale v. Eyre*, 1 Wils. R. 306; *Lever v. Salkeld*, 2 Salk. R. 455; *Greaves v. Roll*, Ib. 456; *Hartness v. Thompson*, 5 Johns. R. 160; *Woodward v. Newhall*, 1 Pick. R. 500. The doctrine is clearly laid down in the abridgments that a release to one operates as a discharge to all; but the cases cited are of releases under deed. Perhaps it is to be questioned, therefore, if the term release was not used in its technical sense, that of a release under seal. The case of *Nicholson v. Revill* is, however, clear, that the rule applies to parol releases.

¹ *Dean v. Newhall*, 8 T. R. 171; *Tuckerman v. Newhall*, 17 Mass. R. 582; *Couch v. Mills*, 21 Wend. R. 424; *McLellan v. Cumberland Bank*, 24 Maine, 566; *Hutton v. Eyre*, 6 Taunt. R. 289; *Cocks v. Nash*, 9 Bing. R. 348; *Walker v. McCulloch*, 4 Greenl. R. 421; *Rowley v. Stoddard*, 7 Johns. R. 210; *Shed v. Pierce*, 17 Mass. R. 628.

² *Brooks v. Stewart*, 9 Adolph. & Ell. 854; *Cocks v. Nash*, 9 Bing. R. 348. In this case Gazelee, J., said, "A deed may be construed as a release or a covenant not to sue according to the intent of the parties, as manifested by the contents of the deed, but the plaintiff cannot show that intent by parol evidence." *Willings v. Consequa*, Pet. C. C. R. 301.

³ *Ibid.* *Solly v. Forbes*, 2 Brod. & Bing. R. 46; *McAllester v. Sprague*, 34 Maine, R. 236.

the obligors; a release therefrom would not discharge the others.¹

§ 33 *n.* Again, if the release be by operation of law, and without the voluntary consent of the obligee, and by no act of his, he will not lose his remedy against the remaining obligor. Thus, if two give a joint obligation or promissory note, and one obtain a discharge under a bankrupt law, an action lies against both; and if the insolvent debtor plead his discharge, the plaintiff may enter a *nolle prosequi* and proceed to judgment against the other.² But where the release by operation of law takes place through the voluntary act of one of the obligees, all the obligors would be discharged. Thus, if the obligee, being a woman marry one of the obligors, the whole debt is extinguished.³ So, also, if an obligee make one of his obligors his executor, and the executor accept the position and act upon it, all the obligors are discharged.⁴ So, also, a judgment recovered against one obligor will not operate as a discharge to the other, unless there have been full satisfaction thereon.⁵

§ 33 *o.* Again, a release to a single obligor by one of many joint and several obligees discharges the obligor from all liability to any of the others,⁶ even though the party giving the release be not a party in actual, personal interest, provided he

¹ Bac. Abr. Release, (G.); Moor, R. 64; Clayton v. Kynaston, 2 Salk. R. 574; 2 Roll. Abr. 412, (G.)

² Ward v. Johnson, 13 Mass. R. 151. Per Wilde, J., Sheehy v. Mandeville, 6 Cranch, R. 253.

³ Ibid. Sir John Needham's Case, 8 Co. R. 136; 21 H. 7, 30; Robertson v. Smith, 18 Johns. R. 459; Bacon, Abr. Release, (B.).

⁴ Cheetham v. Ward, 1 Bos. & Pul. 630; Wankford v. Wankford, 1 Salk. R. 299; Rawlinson v. Shaw, 3 T. R. 557; Harg. & Butler, Co. Litt. 232 *a*, note (1).

⁵ King v. Hoare, 13 Mees. & Welsb. 494.

⁶ Pierson v. Hooker, 3 Johns. R. 68; Southward v. Packard, 7 Mass. R. 95; Fitch v. Foreman, 14 Johns. R. 172; Decker v. Livingston, 15 Johns. R. 479; Austin v. Hall, 13 Johns. R. 286; Napier v. McLeod, 9 Wend. R. 120.

be a necessary party to the record and represent an interest.¹ Where, however, there are circumstances of fraud or collu-

¹ *Gibson v. Winter*, 5 Barn. & Adolph. 102. In this case Lord Denman said, "The plaintiff, though he sues as a trustee of another, must, in a court of law, be treated in all respects as the party in a cause: if there is a defence against him, there is a defence against the *cestui que trust* who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself."

"The following are the authorities which appear to us fully to warrant this position. In *Baerman v. Radenius*, 7 T. R. 668, (in which the question was, whether the admission by the plaintiff, who was clearly a trustee for another, could be received in evidence,) Lord Kenyon says, 'If the question that has been made in this case had arisen before Sir Matthew Hale, or Lords Holt or Hardwicke, I believe it would never have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties to the cause. If the plaintiffs may be taken to be off the record, then they may be examined as witnesses; and yet it is not pretended they could have been examined. I cannot conceive on what ground it can be said that they may be considered not as the parties to the cause for the purpose of rejecting their admissions, and yet as the parties to the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule that an admission made by the plaintiff on the record is admissible evidence.' So a release by the plaintiff on the record suing for the benefit of another, was decided, in a case before Lord Mansfield, (cited in *Baerman v. Radenius*, 7 T. R. 666,) to be a good answer at law, and Lawrence, J., expresses the same opinion in the case last mentioned; and courts of law have been in the habit of exercising an equitable jurisdiction on motion, and setting such releases aside, or preventing the defendant from pleading them, as in *Legh v. Legh*, 1 Bos. & P. 447; *Payne v. Rogers*, Doug. 407; *Jones v. Herbert*, 7 Taunt. 421; and *Abbott, C. J.*, in *Scaife v. Johnson*, 3 B. & C. 422, and many other cases; which practice shows very clearly the opinion of the courts, that, but for their equitable interference the real plaintiff would be barred. In *Craib v. D'Aeth*, 7 T. R. 670, note (b), the circumstances of fraud upon the real plaintiff were replied; but no objection appears to have been taken on this ground, and the general practice is undoubtedly to apply specially to the court. Again, in *Alner v. George*, 1 Campb. 392, where trustees, for the benefit of creditors, sued in the name of the insolvent, Lord Ellenborough held that a receipt in full for the amount by the plaintiff, was an answer to the action; and his Lordship said: 'If a motion had been made in term time to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look to the strict legal rights of the parties upon the record; and there can be no doubt, that a

sion between the party taking such a release and the party giving it, the court would, on motion, set aside the release, and proceed as if it had not been pleaded.¹

§ 33 *p.* But where a release is given to one of two obligors, *with an express proviso*, that it shall not operate to deprive the party giving it of any rights on the contract, and that he shall still have the right to sue both the obligors jointly, it would not operate as an extinguishment of the debt.²

receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released the action; and it is impossible to admit evidence of his attempting to defraud others.' In *Jones v. Yates*, 9 B. & C. 539, Lord Tenterden says: 'We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person;' and therefore it was held, that where one or two partners disposed of some of their effects in fraud of the other, *both* could not sue in a court of law to recover for them, in an action of trover." See also *Wilkinson v. Lindo*, 7 Mees. & Welsb. 81; *Bauerman v. Radenius*, 7 T. R. 668.

¹ *Legh v. Legh*, 1 Bos. & Pul. 447; *Payne v. Rogers*, Doug. R. 407; *Scaife v. Johnson*, 3 Barn. & Cres. 422; *Gram v. Cadwell*, 5 Cowen, R. 489; *Barker v. Richardson*, 1 Younge & Jerv. 362.

² *Twopenny v. Young*, 3 Barn. & Cres. 210. In this case Bayley, J., says: "In general, where a simple contract security for a debt is given, it is extinguished by a specialty security, if the remedy given by the latter is co-extensive with that which the creditor had upon the former. We are not called upon to say whether that would be the case when the remedies are not co-extensive; for where there is that in the instrument which shows that the parties intended the original security to remain in force, the new one has not the effect of extinguishing it, as was recently decided in the case of *Solly v. Forbes and Ellerman*, 2 B. & A. 38. There, a release was given to one of two partners, with a proviso that it should not operate to deprive the plaintiff of any remedy which he otherwise would have against the other partner; and that he might, notwithstanding the release, sue them jointly. A joint action having been commenced, the party released pleaded the release, to which plaintiff replied, that he sued him only in order to recover against the other; and, on demurrer, the replication was held good. Here, the language of the

§ 33 *q*. Where two or more persons, not being partners,¹ are jointly, or jointly and severally, liable on the same contract, or on different contracts for one debt,² and one of them, after the liability thereon has arisen, satisfies the whole claim or more than his own proportion of it, he is entitled to contribution from the other obligors, and may recover from them their several proportions of the common liability, in an action for money paid by him to their use.³ Nor is it necessary to prove that he paid such sum by compulsion⁴ upon suit brought, or judgment rendered against him. But if the sum paid by him be no more than his own share, he would not, of course, be entitled to an action for contribution.⁵ Nor does it matter in such

bill of sale shows that it was intended merely as a further security; that makes the effect of it the same as if an express proviso had been inserted, and prevents it from operating as an extinguishment of the remedy on the note, either as against Rummen or the defendant." *North v. Wakefield*, 13 Q. B. 536; *Lancaster v. Harrison*, 4 Moore & Paym. 561.

¹ The rules as to contribution do not apply to partners. *Pearson v. Skelton*, 1 Mees. & Welsb. 504; *Sadler v. Nixon*, 5 Barn. & Adolph. 936.

² *Deering v. Winchelsea*, 2 Bos. & Pul. 270; *Mahew v. Crickett*, 2 Swanst. R. 185; *Craythorne v. Swinburne*, 14 Ves. 160; *Norton v. Coons*, 3 Denio, R. 130; *Chaffee v. Jones*, 19 Pick. R. 260.

³ *Kemp v. Finden*, 12 Mees. & Welsb. 421; *Burnett v. Minot*, 4 Moore, R. 342; *Prior v. Henbrow*, 8 Mees. & Welsb. 873; *Davies v. Humphreys*, 6 Mees. & Welsb. 153; *Pitt v. Purssford*, 8 Mees. & Welsb. 538; *Sisan v. Kidman*, 4 Scott, N. R. 429; *Edge v. Knapp*, 7 Scott, N. R. 707; *Bachelor v. Fiske*, 17 Mass. R. 469.

⁴ *Pitt v. Purssford*, 8 Mees. & Welsb. 539. In this case the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note as sureties for the principal debtor, and the latter paid only a portion of the amount of the note when it became due, and the plaintiff then paid the residue, although no demand for payment had been made on him by the creditor, and subsequently brought his action against the defendant, his co-surety for contribution; and it was held that he was entitled to recover a moiety of the amount he had paid. "All the parties," said Baron Parke, "were jointly and severally liable to the holders of the note, and as all were liable, one party who has paid the note, may bring an action against his co-surety for contribution without showing that he had paid it by compulsion." See also *Cowell v. Edwards*, 2 Bos. & Pul. 268; *Odin v. Greenleaf*, 3 N. Hamp. R. 270.

⁵ *Geopel v. Swinden*, 13 Law Jour. (N. S.) 113.

case, whether the contract in respect of which the joint, or joint and several liability arises, be a contract under seal, or by parol, or merely implied.¹ Thus, if four persons jointly retain an attorney to defend them from a civil or criminal charge, or to conduct an action for them, and one pay the retainer, the others are liable for contribution.² But this implied promise of contribution may be rebutted by special circumstances, tending to show a different understanding between the parties.³ Thus, where one of four sureties qualified his obligation by adding to his signature the words "surety for the above names," it was held, that he was not liable for contribution to the first surety who had paid the debt.⁴

§ 33 *r.* Where one of the obligors to a joint and several obligation is sued thereon, it seems that he would not ordinarily be entitled to receive contribution for the costs of defending the claim, because he ought to have paid it at once. Yet, if there should be a clear ground of defence, it would perhaps entitle him to contribution. The authorities, however, are quite

¹ *Edge v. Knapp*, 7 Scott, N. R. 707; *Holmes v. Williamson*, 6 M. & S. 158; *Hussey v. Cricket*, 3 Camp. R. 173; *Alexander v. Vane*, 1 Mees. & Welsb. 511.

² *Edge v. Knapp*, 7 Scott, N. R. 707.

³ *Turner v. Davies*, 2 Esp. N. P. C. 479. In this case Lord Kenyon said: "I have no doubt, that where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-surety for contribution: but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security. This is the case here: *Davies*, the defendant, became security, at the instance of *Turner*, the plaintiff, to *Brough*, and there is still less pretext for *Turner* to call on the defendant in this action, as he took the precaution to secure himself by a bill of sale. I am of opinion the defendant ought to have a verdict." See also *Byers v. McClanahan*, 6 G. & Johns. 256; *Taylor v. Savage*, 12 Mass. R. 98; *Thomas v. Cook*, 8 Barn. & Cres. 728; *Robison v. Lyle*, 10 Barb. R. 512. See post, § 886.

⁴ *Harris v. Warner*, 13 Wend. R. 400.

contradictory on these points, and the rule seems not to be settled.¹

§ 33 s. In the next place, we come to the question of survivorship of parties. Where a contract is made by two or more persons jointly, and not jointly and severally, and one of them dies, his liability dies with him, and the survivors become alone responsible. The action upon the contract cannot therefore be brought against his representatives. Nor can the survivors, after satisfying the claim, enforce contribution against the representatives of the party who is dead.² If all of the joint obligors die, however, the representatives of the last survivor become liable on the contract, although they have no right of contribution against the representatives of the other parties. The same rules, also, apply in cases of joint obligees; in case of the death of one, the right of action vests solely in the survivors, and in case of the death of all, the represent-

¹ The rule that costs are recoverable between co-sureties was clearly held in *Kemp v. Finden*, 12 Mees. & Welsb. 421. Baron Parke said, "They were costs incurred in a proceeding to recover a debt for which, on default of the principals, both the sureties were jointly liable, and the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion." The same rule was held in *Davis v. Emerson*, 17 Maine, R. 64; and in *Bonney v. Seely*, 2 Wend. R. 481, and *Cleveland v. Covington*, 3 Strobl. L. 184, a principal was held liable to his sureties for costs. The limitation that there should appear to be ground of defence, is stated in *Fletcher v. Jackson*, 23 Verm. R. 593. See also *Beekley v. Munson*, 22 Conn. R. 299. The opposite doctrine was, however, ruled by Lord Tenterden in *Roach v. Thompson*, Mood. & Malk. 489; *Gillett v. Rippon*, Ibid. 406, and *Knight v. Hughes*, Ibid. 247. See also *Boardman v. Paige*, 11 N. Hamp. R. 431, in which it was held that where judgment was recovered against one, on a suit against all the signers of a note, there was no right of contribution, the costs not being a burden common to all the signers. See also *Henry v. Goldney*, 15 M. & Welsb. 494, in which the same doctrine is stated. See, in respect to contribution between co-sureties, post, § 882 to § 890.

² *Baron, Abr. Obligation*, (D.); *Anderson v. Martindale*, 1 East, R. 497; *Rolls v. Yate*, Yelv. 177; *Tippet v. Hawkey*, Bull. N. P. 158; *Yorks v. Peck*, 14 Barb. S. C. R. 648; *Calder v. Rutherford*, 3 Brod. & Bing. 302; *Foster v. Hooper*, 2 Mass. R. 572; *Waters v. Riley*, 2 Harr. & Gill, 305.

atives of the last survivor are alone entitled to an action.¹ If the contract be joint and several, the liability of the deceased party survives to his representatives, and may be enforced against them either by the obligee in respect to the original obligation, or by the co-obligors in an action for contribution.²

§ 33 *t.* Yet where a contract is, by its terms, solely joint, if it appear by direct proof, or if the facts of the case clearly warrant an inference, that the parties intended it to be joint and several, it will be held in equity to be joint and several, and in case of the death of one of the parties, his representatives will be held liable. The ground, upon which courts of equity proceed in such cases, is, that wherever the nature of the transaction or the facts of the case plainly show that the responsibility was intended to be joint and several, the omission of terms making it so is a matter of mistake or accident, against which relief should be given.³ Every contract for a joint loan for the benefit of all the obligees will, therefore, in equity, be treated as a joint and several contract, whether the transaction be of a mercantile nature or not.⁴ Where, however,

¹ *Ibid.* *Rolls v. Yate*, Yelv. R. 177; *Anderson v. Martindale*, 1 East, R. 479; *Martin v. Crump*, Lord Raym. R. 340.

² *Withers v. Bircham*, 3 Barn. & Cres. 254; *Shaw v. Sherwood*, 1 Cro. Eliz. 729; *Towers v. Moore*, 2 Vern. R. 99; *May v. Woodward*, Freeman, R. 248, n.

³ 1 Story, Eq. Jurisp. § 162 to § 164; *Yorks v. Peck*, 14 Barb. C. C. R. 644; *Wilkinson v. Henderson*, 1 Mylne & Keen, 582; *Thorpe v. Jackson*, 2 Younge & Coll. 553.

⁴ *Weaver v. Shryock*, 6 Serg. & Rawle, 262; *Sumner v. Powell*, 2 Meriv. R. 30; *Underhill v. Harwood*, 10 Ves. R. 227; *Ex parte Kendall*, 17 Ves. R. 525; *Cowell v. Sykes*, 2 Russ. R. 191. In *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 211, Chief Justice Marshall said: "In general, the mistakes against which a court of equity relieves, are mistakes in fact. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact. Yet some of them bear a considerable analogy to that under consideration. Among these is that class of cases in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who were discharged at law. If

the inference of a joint and several liability cannot properly be made, and, *a fortiori*, where it is repelled by the facts of the case,

the principle of these decisions be that the bond was joint from a mere mistake of the law, and that the court will relieve against this mistake on the ground of the preëxisting equity arising from the advance of the money, it must be admitted that they have a strong bearing on the case at bar. But the judges in the courts of equity seem to have placed them on mistake in fact, arising from the ignorance of the draftsman. In *Simpson v. Vaughan*, 2 Atk. 33, the bond was drawn by the obligor himself, and under circumstances which induced the court to be of opinion that it was intended to be joint and several. In *Underhill v. Howard*, 10 Ves. 209, 227, Lord Eldon, speaking of cases in which a joint bond has been set up against the representatives of a deceased obligor, says: 'The court has inferred, from the nature of the condition, and the transaction, that it was made joint by mistake. That is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation.'

"All the cases in which the court has sustained a joint bond against the representatives of the deceased obligor, have turned upon a supposed mistake in drawing the bond. It was not until the case of *Sumner v. Powell*, 2 Meriv. 36, that any thing was said by the judge who determined the cause, from which it might be inferred that relief in these cases would be afforded on any other principle than mistake in fact. In that case, the court refused its aid, because there was no equity antecedent to the obligation. In delivering his judgment, the master of the rolls (Sir W. Grant) indicated very clearly an opinion that a prior equitable consideration, received by the deceased, was indispensable to the setting up of a joint obligation against his representatives; and added: 'So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation.'

"Had this case gone so far as to decide that 'the credit previously given,' was the sole ground on which a court of equity would consider a joint bond as several, it would have gone far to show that the equitable obligation remained, and might be enforced after the legal obligation of the instrument had expired. But the case does not go so far. It does not change the principle on which the court had uniformly proceeded, nor discard the idea that relief is to be granted because the obligation was made joint by a mistake in point of fact. The case only decides that this mistake, in point of fact, will not be presumed by the court in a case where no equity existed antecedent to the obligation, where no advantage was received by, and no credit given to, the person against whose estate the instrument is to be set up.

"Yet the course of the court seems to be uniform, to presume a mistake in point of fact in every case where a joint obligation has been given, and a bene-

a court of equity will not interfere. It will not, therefore, make a joint bond several against a mere surety, except upon positive proof that such was the agreement of the parties; and wherever the obligation or covenant is purely matter of arbitrary convention, not growing out of any antecedent liability in all or any of the obligors or covenantors to do what they have undertaken (as, for example, a bond or covenant of indemnity for the acts or debts of third persons), a court of equity will not, by implication, extend the responsibility from that of a joint to a joint and several undertaking;¹ unless in cases where, through plain mistake, and contrary to their actual agreement, the parties have omitted to insert in the obligation terms rendering it several as well as joint.²

fit has been received by the deceased obligor. No proof of actual mistake is required. The existence of an antecedent equity is sufficient. In cases attended by precisely the same circumstances, so far as respects mistake, relief will be given against the representatives of a deceased obligor, who had received the benefit of the obligation, and refused against the representatives of him who had not received it. Yet the legal obligation is as completely extinguished in the one case as in the other; and the facts stated, in some of the cases in which these decisions have been made, would rather conduce to the opinion that the bond was made joint from ignorance of the legal consequences of a joint obligation, than from any mistake in fact." See also *Yorks v. Peck*, 14 Barb. C. C. R. 644.

¹ Per Mr. Justice Story in 1 Story, Eq. Jurisp. § 164; *Sumner v. Powell*, 2 Meriv. R. 30; *Harrison v. Mirge*, 2 Wash. R. 136; *Ward v. Webber*, 1 Ibid. 274; *Richardson v. Horton*, 6 Beav. R. 186; *Burn v. Burn*, 3 Ves. R. 573.

² *Wiser v. Blatchley*, 1 Johns. Ch. R. 607; *Crosby v. Middleton*, Prec. Ch. 309; *Berg v. Radcliffe*, 6 Johns. Ch. R. 302; *Rawstone v. Parr*, 3 Russell, 424-539.

CHAPTER II.

OF THE PARTIES TO A CONTRACT.

§ 34. WE now come to the consideration of the competency of parties to contract. The general principle of law, is that all persons not rendered incompetent by personal disability, or by considerations of public policy, may be parties to a contract.

§ 35. Incompetency to contract is of two kinds; 1st, natural, and 2d, legal. The former of these classes, subdivides itself naturally into the contracts of — First, Lunatics and Idiots; — Secondly, Drunkards. Lord Coke enumerates four different classes of persons, who are deemed in law to be *non compotes mentis*. The first is an idiot or fool natural; the second is he, who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus, qui gaudet in lucidis intervallis*, and sometimes is of good and sound memory, and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard.¹ No contract can exist, unless there be a mutual consent of the parties, and an intelligent understanding of its terms; and accordingly the first incapacity, recognized by the law, arises whenever the mental infirmity of either party, or of both parties, precludes the possibility of a just apprehension of the terms of the agreement, or of an intelligent assent to them.²

¹ Beverly's case, 4 Co. R. 124; Co. Litt. 247, a.

² Ersk. Institutes, 418.

LUNATICS AND IDIOTS.

§ 36. And, first, as to the contracts of lunatics. A lunatic is a person who is crazy or deranged in intellect and who is incapable of logical sequence of thought or argument. This class includes not only those who have been unsound in intellect from their birth, and those who are permanently insane, but also those in whom the fits of lunacy are intermittent, or who are insane only upon some one subject or class of subjects. If the lunacy be permanent and general, the lunatic is wholly incapacitated from contracting, either in his own behalf, or as agent for another person.¹ But if it be merely intermittent, or if it be confined to a particular subject or class of subjects, so that the mind can act with perfect sanity upon all other subjects, or has lucid intervals of sanity, the incapacity to contract is limited to the subjects in respect to which the party is insane, and to the time during which he is suffering from a fit of lunacy.² And if a contract be made by an insane person during a lucid interval, it will be valid although the party be insane immediately before and after.³ If, however, a party be a mon-

¹ *Sentence v. Poole*, 3 Car. & Payne, 1; *Dunnage v. White*, 1 Wils. C. C. R. 67; *Hall v. Warren*, 9 Ves. Jr. R. 605.

² *Hall v. Warren*, 9 Ves. Jr. R. 605; *Lewis v. Baird*, 3 McLean, R. 56.

³ This same doctrine was laid down by M. D'Aguesseau, as advocate-general, in the parliament of Paris, in the case of the Prince de Conty; a translation of a portion of which is to be found in 2 Evans's *Pothier on Obligations*, No. III. We subjoin the extract containing the description of a lucid interval. "It must not be a superficial tranquillity, a shadow of repose, but on the contrary a profound tranquillity, a real repose; not a mere ray of reason, which only serves to render its absence more manifest as soon as it is dissipated, not a flash of lightning, which pierces through the darkness only to render it more thick and dismal, not a glimmering twilight, which connects the day with the night, but a perfect light, a lively and continued radiance, a full and entire day separating the two nights of the madness which precedes, and that which follows it; and, to adopt another image, it is not a deceitful and faithless stillness which follows or forebodes a tempest, but a sure and steady peace for a certain time, a real calm and a perfect serenity; in short, without looking for so

omaniac, or be insane upon any class of subjects, his power to contract is restricted to those subjects upon which he is entirely sane. And it should, therefore, clearly appear, in the case of a contract by such a person, that his insanity in other particulars did not interfere with his powers or injure his judgment, in the particular matter of his contract. So, also, it should clearly appear, in cases where a contract is made by a lunatic during a lucid interval, that his mind was in complete possession of its sane powers during such interval, and was not in the slightest measure affected by his lunacy. If it be proved that a party is subject to monomania or lunacy, the presumption is, that he is incapable of contracting, and it becomes incumbent upon the other party seeking to recover against him, to prove clearly that the lunatic or monomaniac was perfectly sane and in full possession of his powers at the time when the contract was made.¹

many different images to represent our idea, it must not be a simple diminution, a remission of the malady, but a kind of temporary cure, an intermission so clearly marked, that it is entirely similar to the restoration of health. And, as it is impossible to judge in a moment of the quality of an interval, it is necessary that it should last sufficiently long to give an entire assurance of the temporary reëstablishment of reason; this period it is not possible to define in general, and it depends upon the different kinds of madness. But it is always certain that there must be a time, and that time considerable. These reflections are not only written by the hand of nature on the minds of all men, the law also adds its characters in order to engrave them more profoundly in the heart of judges."

¹ Attorney-General *v.* Parnter, 3 Bro. Ch. R. 443. In this case Lord Thurlow said, "There is an infinite, nay, almost insurmountable, difficulty in laying down abstract propositions upon a subject which depends upon such a variety of circumstances as the present must necessarily do. General rules are easily framed; but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance, which may enter into, and materially affect, the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject; for though it be true, that a mind, in such possession of itself, ought, when acting, to act efficiently, yet it is extremely difficult to lay down,

§ 37. An idiot differs from a lunatic in this, that the former is deficient, and the latter is deranged in understanding. To constitute idiocy, there must be more than mere weakness of mind, but it is not necessary that there should be an absolute absence of intellect. The rule is, that if there be such a deficiency of intelligence as to render the party incapable of understanding and acting in the ordinary affairs of life, or in the particular contract, his idiocy will annul his contract.¹ It is

with tolerable precision, the rules by which such state of mind can be tried. The course of procedure, for the purpose of trying the state of any party's mind, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance, that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such a case, applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind which is deemed necessary, in general, to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party, who had confessedly before labored under a mental derangement, was capable of doing acts binding on himself and others."

¹ *Ball v. Mannin*, 3 Bligh, N. S. 1. In this case Lord Tenterden said, "It was argued by the counsel that the party was not a lunatic,— that is, that he was not at one time of sound mind, and at another time unsound; but whatever the state of mind might be, that it was not temporary but permanent. The judge told the jury that the question was, whether the party was of sound mind or not; and that mode of stating the question was quite correct. He then proceeded to give a definition. 'That to constitute such unsoundness as should avoid a deed at law, the party executing such deed must be incapable of understanding and acting in the ordinary affairs of life.' In that, perhaps, he went too far. The judge then directed the jury that 'It was not necessary he should be without any glimmering of reason; and as one test of such incapacity, they were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its gen-

impossible, of course, to lay down any distinct abstract rules applicable to all cases of idiocy: — it is sufficient to invalidate any contract, if it clearly appear, that the party contracting did not, at the time, understand what he was about.¹

§ 38. But although mere weakness of mind is no ground of incapacity, and affords no sufficient reason for setting aside a contract, it nevertheless constitutes a material consideration in inferring fraud and unfair practice, when the contract is entirely to the disadvantage of the weaker party.² If the contract be open to the imputation of fraud, it will be void, whatever be the character and comparative intelligence of the parties. A court of equity will vacate an agreement, where an evident advantage has been taken of a very weak-minded person, when it would refuse to set aside the same contract, if

eral purport was fully explained to him.' The counsel for the defendant then required the judge to tell the jury, that in order to avoid the deed at law, the unsoundness of mind must amount to idiocy, according to the strict legal definition of an idiot; and this being refused, the bill of exceptions was tendered and sealed. It is impossible to read this record without seeing that the point of the objection is this, and this only, — that it was erroneous to direct the jury to make any other inquiry than this, whether the party was an idiot. If the judge ought so to have directed, the direction given was erroneous; but it is impossible so to contend. The jury were in substance directed to inquire whether the party was of unsound mind; and I find that the Lord Chancellor, according to the authorities, has held that a finding in these terms is sufficient. As to the strict legal definition, I find in an old book on this subject, that if a person is capable of learning the alphabet he is not within the legal definition of idiocy; yet it is impossible to hold that persons no further qualified are capable of executing a deed. The question at law is, whether, in substance, there is such capacity of execution; and, in effect, the judge in this case so put the question to the jury, when he told them that the question was, whether the party was of sound mind or not, and directed them to consider whether he was capable of understanding the deed when explained. The observation as to the glimmering, will not make the whole direction erroneous, nor was it irregular or improper when considered in connection with the other parts of the direction to the jury. In my opinion it was right."

¹ Ibid.

² *Dane v. Kirkwall*, 8 Car. & Payne, 679.

made between persons of more equal understanding.¹ But this is not so much on the ground of mental incompetence, as of the force and effect of the *fraud* practised.² And if no such deception were used, even a court of equity will refuse relief, inasmuch as it cannot undertake to graduate intellectual differences on a nicely adjusted scale, nor to reduce sagacity and talent to the level of weakness and folly.³

§ 39. It was an old maxim of the common law, affirmed by Lord Coke, that "a man shall not be allowed to stultify himself."⁴ And although a different doctrine had been previously laid down by Fitzherbert,⁵ and affirmed by Britton and Bracton, it nevertheless was afterwards overruled, and this maxim was established and defended both in principle and in practice, upon the ground, that, "a man cannot always remember what he did when he was out of his mind; and consequently cannot recollect whether he did this or that particular act, or entered into this or that particular contract." But although the privilege of pleading idiocy or lunacy was denied to the lunatic himself, it was always permitted to his privies in blood and in representation, that is to his heirs, and executors or administrators, who could, after his death, avoid his contract, on the ground that he was *non compos mentis*.⁶ This distinction seems to cast a still greater absurdity over the maxim, since it seems impossible to found any such dis-

¹ 1 Story, Eq. Jur. § 238; *Gartside v. Isherwood*, 1 Bro. Ch. R. App. 560, 561; 1 Fonbl. Eq. B. 1, ch. 2, § 3; 21 Am. Jur. 4; 3 Woodeson's Lect. 453; *McDearmid v. McDearmid*, 3 Bligh, N. S. 374; *Dent v. Bennet*, 7 Sim. 589; *Dunnage v. White*, 1 Wils. C. C. R. 67.

² *McAdam v. Walker*, 1 Dow. R. 177; *Grant v. Thompson*, 4 Conn. 208.

³ See 1 Story on Eq. Jur. § 224, &c., where the whole matter is thoroughly discussed. *Lewis v. Pead*, 1 Ves. Jr. 19; *Farnum v. Brooks*, 9 Pick. R. 212.

⁴ 4 Co. 123; Co. Litt. 147.

⁵ Fitzherbert, *Natura Brevium*, 202, n.

⁶ Co. Litt. 247, a. b.; *Beverley's case*, 4 Co. R. 123, 124; 2 Black. Com. 291, 292; 1 Fonbl. Eq. B. 1, ch. 2, § 1, ch. and note (k); *Shelford on Lunatics*, ch. 6, § 2, p. 255, 263; 1 Story, Eq. Jurisp. § 225.

tion upon principle. The maxim has been vigorously assailed by eminent minds in all ages. Fonblanque has declared it to be "in defiance of natural justice, and the universal practice of all civilized nations in the world."¹ Lord Holt has said, that "it is unaccountable, that a man shall not be able to excuse himself by the visitation of Heaven, when he may plead duress from men to avoid his own act."² Sir William Evans affirms that "nothing could be more absurd" than this maxim;³ and Mr. Justice Story says, in relation to it, "How so absurd and mischievous a maxim could have found its way into any system of jurisprudence, professing to act upon civilized beings, is a matter of wonder and humiliation."⁴ If it could prevent persons from becoming idiots or madmen, it might be of incalculable advantage, but as it never seems to have produced this result, it only stands as a useless and absurd exception to the principle, affirmed by Grotius to be a part of the law of nature, that the use of reason is the first requisite to constitute the obligation of a promise.⁵ The civil law, with common sense and justice, declares that "*Furiosus nullum negotium gerere potest, quia non intelligit quod agit.*"⁶

§ 40. The only rational interpretation that can be given to this maxim, would seem to be in applying it only to cases where the lunatic sets up his lunacy as an excuse for acts done by him to the prejudice of others, when such acts will be of no injury to himself;—but where his contracts enure to his own injury, he ought not to be bound thereby.

§ 41. The English law, although it has not as yet completely discarded this maxim, has greatly modified it in its

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 1, 46. See also *Yates v. Boen*, 2 Str. 1104; Buller's N. P. 172.

² *Thompson v. Leach*, 3 Mod. R. 301.

³ 2 Pothier on Oblig. Evans's note, Appendix, No. 3, p. 28.

⁴ 1 Story, Eq. Juris. § 225.

⁵ *De Jure Belli*. B. 2, ch. 11, § 5.

⁶ *Inst. Lib.* 3, tit. 20, § 8; *Dig. Lib.* 50, tit. 17, l. 5, l. 40.

operation; and although lunacy alone cannot be pleaded in England, as a perfect defence to a simple contract, yet it is admissible as stringent evidence to establish imposition.¹ The contract with a lunatic or idiot stands, therefore, upon the same ground with that of a sane and intelligent person, with this modification, that acts and facts will afford an indication of fraud in the one case, when they would not in the other. Thus, where an action was brought for the use and occupation of a house, taken under a written agreement, at a stipulated rent, it was held, that it was not sufficient to show that the lessee was a lunatic, and that the house was unnecessary, in order to absolve her from responsibility, but that it must also be shown that the plaintiff knew this, and took advantage of her lunacy.² Yet lunacy seems to be considered a good defence in England to a specialty made when the party was a lunatic.³ No sufficient reason is, however, apparent for the difference of the rule relating to parol contracts and to specialties, since if the mental infirmity be so great in the one case as to invalidate contracts under seal, (which may differ from a parol contract only in the fact of sealing and delivery,) why is it not

¹ In *Brown v. Joddrell*, 3 Car. & Payne, 30, lunacy was pleaded as a defence to an action of assumpsit for work and labor done. Lord Tenterden said: "I think that this defence cannot be allowed, and that no person can be suffered to stultify himself, and set up his own lunacy in his defence. If indeed it can be shown, that the defendant has been imposed upon by the plaintiff in consequence of his mental imbecility, it might be otherwise, and such a defence might be admitted." *Sentance v. Poole*, 3 Car. & Payne, 1; *Levy v. Baker*, M. & M. 106, n.; *Manby v. Scott*, 1 Sid. 112; *Baxter v. The Earl of Portsmouth*, 5 Barn. & Cress. 170. In *Faulder v. Silk*, 3 Campb. 126, Lord Ellenborough thought, "that an inquisition of lunacy was by no means conclusive on the trial of that issue, but was admissible as evidence." See also *Sergeson v. Sealey*, 2 Atk. 412; *Tarbuch v. Bispham*, 2 Mees. & Welsb. 2; *Ball v. Mannin*, 3 Bligh, N. R. 1.

² *Dane v. Kirkwall*, 8 Car. & Payne, 679; *Year-Book*, 9 Henry 6, b. Britton, tit. Dette, fol. 66.

³ *Baxter v. The Earl of Portsmouth*, 5 Barn. & Cres. 170; *Chitty on Contracts*, 136. But see *Yates v. Boen*, 2 Str. R. 1104; *Faulder v. Silk*, 3 Campb. R. 126; *Sergeson v. Sealey*, 2 Atkyns, R. 412, contra.

sufficient to annul a parol contract, which may be entered into with less deliberation, and affords a wider scope for surprise and imposition?

§ 41 *a*. In America, the old maxim has been utterly discarded, as at variance with reason and justice, and the authorities fully sustain the more just and equitable doctrine, that either lunacy or idiocy nullify a contract, and that it may be specially pleaded in evidence, or shown in evidence, under the general issue.¹

§ 42. Where a contract has been executed, if it be for the procuring either of necessities or of articles suited to the rank and station of the lunatic, and be entered into *bonâ fide*, a court of law will enforce it.² The ground of this rule is, that since the lunatic has had the benefit of the articles, and no advantage has been taken of him, it is but just that he should pay for them, "*Qui sentit commodum, sentire debet et onus.*" Nor is this rule confined to executed contracts for necessities,

¹ *Mitchell v. Kingman*, 5 Pick. 431; *Seaver v. Phelps*, 11 Pick. 304; *Fitzgerald v. Reed*, 9 Sm. & Marsh. 94; *Rice v. Peat*, 15 Johns. R. 503; *Grant v. Thompson*, 4 Conn. R. 202; *Lang v. Whidden*, 2 N. H. R. 435; *Somes v. Skinner*, 16 Mass. R. 348. It has been held, however, in Massachusetts, "that the deed of a person *non compos*, not under guardianship, conveyed a seisin, and was voidable only; but when under guardianship, was void." *Wait v. Maxwell*, 5 Pick. 217; *Breckenbridge v. Ormsby*, 1 J. J. Marshall, 24.

² *Baxter v. Earl of Portsmouth*, 2 C. & P. 178. The defendant, in this case, being a lunatic, hired and used certain carriages and harnesses, which were made to his order, and for which he agreed to pay a certain annual sum. The defendants were unaware of his insanity. Suit was instituted upon the contract, and it appeared in evidence that the defendant often used the carriages, and that they were suitable to his rank and situation. Abbott, Chief Justice, in his opinion, said: "I was of opinion, at the trial, that the evidence produced in this case was not such as ought to defeat the plaintiff's right of recovering in the present action; considering that it was brought for the hire and use of carriages suited to the state and degree of the defendant, and by him actually ordered and enjoyed." *McCrillis v. Bartlett*, 8 N. Hamp. R. 569; *Wentworth v. Tubb*, 1 Younge & Col. N. C. 171; *Moulton v. Camroux*, 12 Jur. 800.

although it applies with peculiar force thereto, but governs generally all completely executed contracts for the purchase of property, where the lunatic is not of an utterly unsound mind, the fact of lunacy is unknown, and no advantage has been taken, and where the subject-matter of the contract has been fully enjoyed and cannot be restored so as to put the parties *in statu quo*.¹ Indeed, the rule has been pressed still further, and

¹ *Moulton v. Camroux*, 2 Excheq. 487; s. c. 4 Excheq. 17. In this case the court said: "We are not disposed to lay down so general a proposition as that all executed contracts *bonâ fide* entered into, must be taken as valid, though one of the parties be of unsound mind; we think, however, we may safely conclude, that, when a person, comparatively of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property the subject-matter of the contract has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him; and this is the present case, for it is the purchase of an annuity which has ceased." In *Beals v. See*, 10 Barr, R. 60: "As to the rest of the case, the judge charged pretty much as the law is laid down in *La Rue v. Gilkyson*, 4 Barr, 375, in which it was said, that an insane man, like an infant, is liable on his executed contract for necessities; and in which it was intimated, that he would be liable for merchandise innocently furnished to his order. Should he have made a wild and unthrifty purchase from a stranger unapprised of his infirmity, who is to bear the loss that must be incurred by one of the parties to it? Not the vendor, who did nothing that any other man would not have done. As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without showing it; and, when such a man goes into the market, makes strange purchases, and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman, would exclude every speculator from the transactions of commerce. The epidemic of the country is, an impatient desire to become suddenly rich by desperate adventure, instead of awaiting the slow but sure approach of wealth from industry and small profits. Had there been fraud, or undue advantage taken — but the judge declares that it was not imputed at the trial, and we are bound by his report — the personal appearance and extravagant views of the intestate might have been left to the jury, as circumstances that ought to have put the defendants on their guard; but the prayers for direction seem to have been

it has been held in a late case in the Court of Exchequer, that where a lunatic pays a deposit on the purchase of real estate to a vendor who has no knowledge of his lunacy, and the contract itself is fair, he cannot recover the deposit.¹ Whether

founded on a notion that, independent of every other consideration, a *non compos mentis* has not capacity either to make or to execute a contract, under any circumstances — a position altogether untenable. But the question of fair dealing seems not to be seriously agitated; and, if the plaintiff had relied on it, it would have been his business to go with it before the jury.” *Fitzhugh v. Wilcox*, 12 Barb. R. 235; *Price v. Bennington*, 7 Eng. Law & Eq. R. 254; *Dane v. Kirkwall*, 8 Car. & Payne, 679.

¹ *Beavan v. McDonnell*, 24 Eng. Law & Eq. 486. (In this case the reasoning of the court through Mr. Baron Park, was as follows: “The question is whether the present case falls within the principle of *Moulton v. Camroux*, and we think that it does. It will be observed, that the replication in this case states an additional fact, the absence of which occasioned the remark by Mr. Justice Patteson, in giving the judgment of the Court of Error. The special verdict in that case stated, that the intestate was, at the time of the contract, a lunatic, and of unsound mind, so as to be incapable to manage his affairs. Mr. Justice Patteson observed: ‘That did not show such a state of mind in the grantee as to render him necessarily incapable of knowing the nature of his acts.’ The replication supplies this supposed defect, by averring that the plaintiff was a lunatic and of unsound mind, and thereby incapable of contracting, or of understanding the meaning of contracts, and the statement is, in other respects, the same as that of the special verdict in this case. We think this makes no difference between the present case and that already decided, and we are further of opinion that this falls within the principle of that case. This action was not brought on an executory contract. The plaintiff is seeking to recover back a sum of money paid to the defendant on a contract, which the defendant has performed, and according to which he is entitled to retain it. The contract was entered into by the defendant, and the money received fairly and in good faith, and without knowledge of lunacy, and being a transaction completely executed, as far as the deposit is concerned, the defendant has done all he is bound to do to make that his own. The plaintiff has had all he bargained for, the power of buying the estate and a title established in a given time on payment of the residue of the purchase-money. The case is in substance the same as if the plaintiff had paid to the defendant a sum of money down, to abide the event of his performing a certain piece of work in a certain time; and if the defendant has done this stipulated work, the money is now his own, and the plaintiff cannot recover it back. Judgment for the defendant.” This, however, would seem to be merely an executory contract, the payment of the deposit being merely a preliminary, and to secure the per-

the doctrine to this extent would be supported in this country seems doubtful,¹ but it is clearly established that wherever a contract is made with a lunatic apparently sane, and without ingredients of fraud and overreaching, it cannot, when executed, be rescinded unless the parties can be reinstated in their previous position.²

§ 42 *a*. Where, however, the contract is executory, it could not be enforced against the lunatic.³ Yet if he had received any advance thereon he would be bound, in rescinding his contract, to restore it to the other party.⁴ So, if the contract be partially executed, it would be binding on the lunatic as far as it was executed completely, but not in respect to the part not executed, unless the contract were not susceptible of appor-

formance of the whole contract. The whole contract failing, it would seem that there was no consideration to support the payment of the deposit, except the delivery of the abstract of title by the vendor. And inasmuch as the deposit was £415, the consideration seems grossly beyond the worth of such acts. The consideration for the payment of the deposit being the complete contract, on the failure thereof, it would seem that so much of the deposit only should have been retained as would remunerate the vendor for his acts and trouble.

¹ The cases in this country are somewhat contradictory. *Seaver v. Phelps*, 11 Pick. R. 314; *Rice v. Peat*, 15 Johns. R. 503; *Fitzgerald v. Reed*, 9 Smed. & Marshall, 94, are contrary to the rule as laid down in *Beavan v. McDonnell*. But in *Beals v. See*, 10 Barr, R. 60, the court seem to support it. In *Loomis v. Spencer*, 2 Paige, R. 158, the Chancellor said: "A court of equity ought not to interfere where the lunatic has actually had the benefit of the property, if the contract was made in good faith, without knowledge of the incapacity, and where no advantage has been taken of the situation of the party." But it is also held in this case that the parties must be replaced *in statu quo*. See *Wait v. Maxwell*, 5 Pick. R. 217; *Le Rue v. Gilkyson*, 4 Barr, R. 375.

² *Beavan v. McDonnell*, 24 Eng. Law & Eq. R. 484; *Beals v. See*, 10 Barr, R. 56; *Price v. Berrington*, 7 Hare, R. 394; *Moulton v. Camroux*, 2 Excheq. R. 487; s. c. 4 Excheq. R. 17; *Fitzhugh v. Wilcox*, 12 Barb. R. 235; *Dane v. Kirkwall*, 8 Car. & Payne, 679.

³ *Beavan v. McDonnell*, 24 Eng. Law & Eq. R. 484; *Le Rue v. Gilkyson*, 4 Barr, R. 375; *Loomis v. Spencer*, 2 Paige, R. 158; *Beals v. See*, 10 Barr, R. 60.

⁴ *Loomis v. Spencer*, 2 Paige, R. 158; *Moulton v. Camroux*, 2 Excheq. R. 487; 4 Ibid. 17; *Hall v. Warren*, 9 Ves. R. 605.

tionment.¹ In all cases where the circumstances under which a contract is made, are such as would, in the mind of a reasonable man, induce a belief in the insanity of the other party, the contract would be held to be invalid on the ground of fraud.

§ 42 *b*. But the deed of a lunatic is only voidable, and not void; and in order to avoid it, on his restoration to his right mind, he must return the price paid, or the contract for its payment, if not paid. If he receive payment after the return of sanity, and gives no notice of his intention to disaffirm the conveyance, his ratification may be inferred.²

§ 43. The modern cases show a strong analogy between the responsibility of an infant and a lunatic upon their contracts. Neither is ordinarily liable upon specialties, and both are liable for necessities supplied *bonâ fide*.³ But the responsibilities of a lunatic are in many cases more extended than those of an infant, particularly in executed contracts, which are not for necessities.

§ 43 *a*. In the different States of this country, it is provided by statute, that upon representation or request, idiots, lunatics, drunkards, and other persons of unsound mind, may be put under guardianship;—and in such cases the finding of the fact of lunacy by a competent court, and the appointment thereby of a guardian, is conclusive evidence of unsoundness of mind so as to render all contracts subsequently entered into by the lunatic, void;⁴ unless in cases of absolute necessities

¹ *Beavan v. McDonnell*, 24 Eng. Law & Eq. 484.

² *Arnold v. Richmond Iron Works*, 1 Gray, 434. See also *Moulton v. Camroux*, 2 Exch. R. 487; *Price v. Berrington*, 7 Eng. Law & Eq. R. 254; *Fitzhugh v. Wilcox*, 12 Barbour, 235.

³ *Baxter v. Earl of Portsmouth*, 2 Car. & Payne, 178; *Dane v. Kirkwall*, 8 Car. & Pay. 679; *Tarbuch v. Bispham*, 2 Mees. & Welsb. 6; *Fisher v. Jewett*, Bert. R. 35.

⁴ In *Leonard v. Leonard*, 14 Pick. 280, Mr. Justice Morton said, "It is suggested on the part of the defendant, that an inquisition of lunacy in England, is not conclusive on the question of sanity; but it is a sufficient answer, that such an inquisition is very different from the proceedings in a court of probate under our statute. The plaintiff insists, that the guardianship is con-

supplied to the lunatic under special circumstances.¹ In England, however, the rule is different, and an inquisition only creates presumptive evidence of lunacy as to third parties.²

DRUNKARDS.

§ 44. We now come to the second subdivision of persons naturally incompetent to contract, namely, drunkards. It was formerly held, that in order to obtain relief from a contract entered into during intoxication, it was incumbent upon the party to show, that the intoxication was occasioned by the contrivance of the other party, which, as it would betoken fraud and imposition, would invalidate the agreement.³ But though a long-mooted question, it is now settled, that drunkenness is a complete defence to a contract. A distinction is, how-

clusive of the disability of the ward, in relation to all subjects on which the guardian can act, and that the only mode of preventing this operation is by procuring the guardianship to be set aside. And there can be no question but that the judge of probate has power to reconsider the subject, and if it shall appear that the cause for the appointment of a guardian has ceased, or that the guardian is an improper person for the office, the letter of guardianship may be revoked. *McDonald v. Morton*, 1 Mass. R. 543. In the case of *White v. Palmer*, 4 Mass. R. 147, it was held that the letter of guardianship was competent evidence of the insanity of the ward, and the reasoning tends to show that it is conclusive; but this was not the question then before the court. If this were not the general principle of the law, the situation of the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust. In every action he might be obliged to go before the jury upon the question of sanity, and one jury might find one way, and another another. We are of opinion, that as to most subjects, the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient capacity, may make a will, for this is an act which the guardian cannot do for him. But the transaction now in question falls within the general rule." See also *Fitzhugh v. Wilcox*, 12 Barb. R. 235; *Wadsworth v. Sherman*, 14 Barb. R. 169. But see contra, *In re Gangwere's Estate*, 14 Penn. R. 417; *Hart v. Deamer*, 6 Wend. R. 497; *Hopson v. Boyd*, 6 B. Munroe, R. 296.

¹ *McCrillis v. Bartlett*, 8 N. Hamp. R. 569.

² *Sergeson v. Sealey*, 2 Atk. R. 412; *Faulder v. Silk*, 3 Camp. R. 126.

³ Co. Litt. 247; Heineccius, Elem. Jur. Nat. lib. 1, ch. 14, § 392; *Cory v. Cory*, 3 Ves. R. 19; *Stockley v. Stockley*, 1 Ves. & B. 30; 3 P. Williams, 130, and note A.

ever, to be taken between executed contracts for necessities of which the drunkard has received the benefit, and executory contracts, on his part, to do certain acts, — and also between express contracts requiring the distinct and expressed assent of both parties, and contracts implied from the circumstances of the case, in which the law creates the liability. Where, therefore, to an action of assumpsit by the indorsee against the indorser of a bill of exchange, the defendant pleaded, that when he indorsed the bill he was so intoxicated as not to be able to understand what he was about, it was held that the answer was sufficient, — for this is an express, as well as an executory contract.¹ But where goods are supplied to a person during a fit of drunkenness, although on recovering his senses he might repudiate the contract, yet if he keep them and avail himself of them after he becomes sober, he would be liable for the value of the goods, — for in such cases the law implies a promise to pay for them.² So, also, in cases where absolute necessities are supplied to and consumed by a person in a condition of complete intoxication, he would be liable therefor, on the same ground.³ But the action which should be brought in such a case, is assumpsit for goods sold and delivered, and not for goods bargained and sold.⁴

¹ *Gore v. Gibson*, 13 Mees. & Welsb. 623. See also *Cooke v. Clayworth*, 18 Ves. R. 15; *Barratt v. Buxton*, 2 Aiken, R. 167.

² *Gore v. Gibson*, 13 Mees. & Welsb. 623. In this case, Mr. Baron Alderson said that a party, “even in a state of complete drunkenness, may be liable, in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessities; so, also, where he keeps the goods when he is sober; the ground of his liability then is, that an implied contract to pay for the goods arises from his conduct when he is sober; though I much doubt whether, if he repudiated the contract when sober, any action could be maintained on it.” The Lord Chief Baron also said: “So a tradesman, who supplies a drunken man with necessities, may recover the price of them, if the party keep them when he becomes sober, although a count for goods bargained and sold would fail.” See also *Smith on Contracts*, p. 233, and note by Symons; *McCrillis v. Bartlett*, 8 N. Hamp. R. 569; *Richardson v. Strong*, 13 Iredell, R. 106.

³ *Ibid.* *Pitt v. Smith*, 3 Camp. R. 33; *Fenton v. Holloway*, 1 Stark. R. 126; *Cooke v. Clayworth*, 18 Ves. R. 15; *Drummond v. Hopper*, 4 Harrington, R. 327; *Prentice v. Achorn*, 2 Paige, R. 30; *Seymour v. Delancy*, 3 Cowen, R. 445; *Wigglesworth v. Steers*, 1 Hen. & Munf. 70.

⁴ *Ibid.*

§ 45. The law will not inquire into the cause, if satisfactory proof be given, that, at the time the contract was entered into, either party was incapacitated by intoxication from exercising his judgment.¹ Such drunkenness must, however, be so excessive and absolute, as to suspend the reason for a time, and create impotence of mind,² for "the merriment of a cheerful cup, which rather revives the spirits than stupefies the reason, is no hinderance to the contracting of just obligations."³ But

¹ Lord Ellenborough, in *Pitt v. Smith*, 3 Campb. 33, says: "There was no agreement between the parties, if the defendant was intoxicated in the manner supposed, when he signed the paper. He had not an agreeing mind." Pothier on Obligations, p. 1, art. 4, § 49; *Fenton v. Holloway*, 1 Stark. R. 126; *Cooke v. Clayworth*, 18 Ves. R. 15; *Jenners v. Howard*, 6 Blackf. R. 240.

² *Belcher v. Belcher*, 10 Yerger, R. 521; *Pittinger v. Pittinger*, 2 Green, Ch. R. 156; *Ford v. Hitchcock*, 8 Ohio R. 214; *Jenners v. Howard*, 6 Blackf. R. 240.

³ Puffendorf, Book iii. ch. 6, § 4; *Cooke v. Clayworth*, note to *Pitt v. Smith*, 3 Campb. 33; s. c. 18 Ves. 12; 16 Bull. N. P. citing the opinion of Holt, Chief Justice; *Fenton v. Holloway*, 1 Stark. N. P. C. 126, per Lord Ellenborough. This doctrine is also supported by the French, Dutch, and Scotch law. See Pothier on Obligations, Pt. 1, ch. 1, § 1, art. 4, No. 49; 2 Evans's Pothier on Obligations, No. 3, p. 28; Institutes of Hölland, p. 190. "An obligation granted by a person, while he is in a state of absolute and total drunkenness, is ineffectual, because the grantor is incapable of consent, for the law has thought it equitable to protect those who have not the use of their reason, (even though they should have lost it through their own folly,) from the fraud and circumvention of others." Erskine's Institutes of the Law of Scotland, &c. 418. See *Gore v. Gibson*, 13 Mees. & Welsb. 623. In this case Baron Parke said: "Where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication; and total drunkenness is now held to be a defence." See also *Mitchell v. Kingman*, 5 Pick. R. 431; *Webster v. Woodford*, 3 Day, R. 90; *Seaver v. Phelps*, 11 Pick. R. 304; *Rice v. Peet*, 15 Johns. R. 503. Baron Parke, in *Gore v. Gibson*, says: "If the party was only partially drunk, so that he nevertheless knew what he was about,

if a person be reduced to such extreme debility by intoxication, as to be unable to rise, or to sit up in his bed without support, or to hold a pen and make a mark, unless the pen and hand are held for him, his written contract will not be binding.¹ Whether the intoxication were so great as to suspend the faculties and destroy the power of intelligent assent is a question for the jury.² Nor does it make any difference, that the drunkenness was voluntary and wilful, for the legal theory is, that without the capacity of giving a deliberate assent, no contract can be made.³ Intoxication, however, only renders a contract voidable, and not void, so that the party intoxicated may, upon recovering his understanding, adopt it.⁴

§ 45 *a*. But although a person who is only excited by drink, and not to such an extent as to impair his reasoning faculties, cannot ordinarily avoid a contract on the ground of drunkenness. Yet if it appear that he was incited thereto by the other party, and advantage was taken of his condition to urge and over-influence him, he would be entitled to relief in equity, on the ground of fraud practised on him to his injury.⁵

equity would not relieve; but here the plea states, that the defendant was so entirely deprived of the use of his reason that he could not comprehend the meaning or effect of the indorsement."

¹ *Wilson v. Bigger*, 7 Watts & Serg. 111. See also *Burroughs v. Richman*, 1 Green, R. 233.

² *Burroughs v. Richman*, 1 Green, (Law) R. 238.

³ *Cooke v. Clayworth*, 18 Ves. 15.

⁴ *Barrett v. Baxton*, 2 Aiken, R. 167; *King's executors v. Bryant's executors*, 2 Haywood, (N. C.) R. 394; *Burroughs v. Richman*, 1 Green, (N. J.) R. 243; *Taylor v. Patrick*, 1 Bibb, 168; *Reinicker v. Smith*, 2 Harris & Johnson, 423; *Arnold v. Hickman*, 6 Munf. 15; *Williams v. Inabnet*, 1 Bailey, (S. C.) 343; *Reynolds v. Waller's Heir*, 1 Wash. 164; *Fitzgerald v. Reed*, 9 Sm. & Marsh. 94; *Owlig's case*, 1 Bland. R. 317; *Drummond v. Hopper*, 4 Harrington, R. 327; *Seymour v. Delancy*, 3 Cow. 445; *Dorr v. Munsell*, 13 Johns. 430.

⁵ *Reynolds v. Wall*, 1 Wash. Ch. R. 164; *Hutchinson v. Tindell*, 2 Green, Ch. R. 357; *Pittinger v. Pittinger*, 2 Green, Ch. R. 156; *Conant v. Jackson*, 16 Verm. R. 335; *Campbell v. Spencer*, 2 Barn. R. 133; *Wilson v. Bigger*,

§ 46. Drunkenness is no defence to a criminal prosecution, though it may operate in mitigation of sentence, and perhaps reduce the class of the particular offence.¹ This exception to the general rule, "*non reus nisi mens sit rea*," is wisely introduced, inasmuch as no man has a right to put himself in a situation, which, while it endangers the lives and interests of others, renders him entirely irresponsible.

§ 47. We now come to the second class of cases, wherein there is a legal incapacity to contract, growing out of public policy and convenience; and this class we shall subdivide as follows, namely: 1st, Outlaws and persons attainted; 2d, Aliens; 3d, Infants; 4th, Married women; 5th, Slaves; 6th, Seamen.

OUTLAWS AND PERSONS ATTAINTED.

§ 48. The process of outlawry is almost wholly unknown in this country, and in the few States, in which the English practice has been introduced, the same disabilities and forfeitures are not incurred, as in England. It was abolished in Massachusetts, in June, 1831, though it had then been long obsolete. The maxim applicable to outlaws, by the English law, is, "Let them be answerable to all, and none to them." Accordingly, any person outlawed in a criminal prosecution or civil suit, or sentenced to transportation, or convicted of felony, is "*civiliter mortuus*." He can hold no property given or devised to him, and all the property, which he held before, is forfeited, and vests in the government, in the King in England, and formerly in the Commonwealth here. He can

7 Watts & Serg. 124; Morrison v. McCord, 2 Dev. & Batt. 226; Cory v. Cory, 1 Ves. sen. 19; Johnson v. Medlicott, 3 P. Wms. R. 130, note; Stockley v. Stockley, 1 Ves. & B. 23.

¹ Pennsylvania v. McFall, Addison, R. 257; 1 Russell on Crimes, 11; 1 Leading Criminal Cases.

neither sue on his contracts, nor has he any legal rights which can be enforced; while at the same time he is personally liable upon all causes of action.¹ He can, however, bring actions "*in autre droit*," as executor, administrator, &c., because in such actions he only represents persons capable of contracting, and under the protection of the law.²

§ 49. Attainder creates all the disabilities that result from sentence of death, but it does not affect the person or his property until after judgment of death or outlawry. Its consequences are forfeiture of all estates, and corruption of blood, both upward and downward. So that a person attainted, can neither inherit nor transmit property, but obstructs all descents to his posterity. The incidents of attainder are fully stated by Chitty and Blackstone;³ but it can be of little use to detail them in this place; for the Constitution of the United States declares, that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," and also, "that no bill of attainder shall be passed," and that "no State shall pass any bill of attainder."⁴

§ 50. The person attainted cannot contract for his own benefit, nor maintain suit against another, though he himself is liable. But the legal rights of the outlaw and person attainted, revive upon pardon or reversal of sentence.⁵

§ 51. In the New England States, sentence of death creates

¹ *Bullock v. Dobbs*, 2 Barn. & Ald. 250; *McDonald v. Foster*, C. L. 61.

² Tidd's Pr. 9th ed. 131; *Ex parte Franks*, 7 Bing. 762; 1 Chitty, Crim. Law, 347, 730; Bacon's Abr. Outlawry; 4 Black. Comm. ch. 24, p. 320; 3 Ibid. ch. 19, p. 283; Co. Litt. 128 (a); Gilb. C. P. 197.

³ Chitty on Crim. Law, 723; 4 Blackstone's Comm. 380; Sheppard's Touch. 232, 233.

⁴ Constitution of the U. S. Art. III. § 3, Art. I. § 9, Art. I. § 10.

⁵ Bacon's Abr. Pardon, H.; *In the matter of Deming*, 10 Johns. R. 232, 483; *People v. Pease*, 3 Johns. Cas. 333; 2 Hawkins, Ch. 37, (Curwood's ed.)

no forfeiture of property, or disability to sue and contract, and the same rule probably obtains in all the States in the Union, unless it be otherwise decreed by statute.¹

ALIENS.

§ 52. The next class is that of aliens. An alien is a person born in a foreign country, of foreign parents, and not naturalized within his adopted country.² The mere fact, that a person is born in a foreign country, will not render him an alien, if his parents be not subjects of that country, but be merely journeying, or temporarily residing there.³ But the children of

¹ In the matter of Deming, 10 Johns. 233. In New York, conviction of treason creates civil death and forfeiture of property during the life of the convict.

² *Ainslie v. Martin*, 9 Mass. R. 456; *Jackson v. Wright*, 4 Johns. R. 75.

³ *Wilson v. Marryatt*, 8 T. R. 31; s. c. 1 Bos. & Pul. 430; *in re Bruce*, 2 Crompt. & Jerv. 436. This is apparently the doctrine of the common law. In England, the statutes of 25 Edward III. stat. 2, and 7 Anne, ch. 5, have established it, if there were any doubt thereof; but in America, the doctrine has not been established by statute to the same full extent. By the 4th sect. of the act of congress of the 14th April, 1802, establishing a uniform rule of naturalization, it was enacted, "that the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States." Of this provision Mr. Chancellor Kent says: "This provision appears to apply only to the children of persons naturalized, or specially admitted to citizenship; and there is color for the construction, that it may have been intended to be prospective, and to apply as well to the case of persons *thereafter* to be naturalized, as to those who had previously been naturalized. It applies to all the children of 'persons duly naturalized,' under the restriction of residence and minority, at the time of the naturalization of the parent. The act applies to the children of *persons* duly naturalized, but does not explicitly state, whether it was intended to apply only to the case where both parents were duly naturalized, or whether it would be sufficient for one of them only to be naturalized, in order to con-

a mother, who is a native-born citizen married to a foreigner

fer, as of course, the rights of citizens upon the resident children, being under age. Perhaps it would be sufficient for the father only to be naturalized; for in the supplementary act of the 26th of March, 1804, it was declared, that if any alien, who should have complied with the preliminary steps made requisite by the act of 1802, dies before he is actually naturalized, his *widow* and *children* shall be considered as citizens. This provision shows, that the naturalization of the *father*, was to have the efficient force of conferring the right on his children; and it is worthy of notice, that this last act speaks of *children* at large, without any allusion to residence or minority; and yet, as the two acts are intimately connected, and make but one system, the last act is to be construed with reference to the prior one, according to the doctrine of the case *Ex parte Overington*. By a subsequent part of the same 4th section, it is declared, 'that the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States; provided that the right of citizenship shall not descend to persons, whose fathers have never resided within the United States.' This clause is certainly not prospective in its operation, whatever may be the just construction of the one preceding it. It applied only to the children of persons who *then were*, or *had been* citizens; and consequently the benefit of this provision narrows rapidly by the lapse of time, and the period will soon arrive, when there will be no statute regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. The proviso annexed to this last provision seems to remove the doubt arising from the generality of the preceding sentence, and which was whether the act intended by the words, 'children of persons,' both the father and mother, in imitation of the statute of 25 Edward III., or the father only, according to the more liberal declaration of the statute of 4 Geo. II. The provision also differs from the preceding one, in being without any restriction as to the age or residence of the child; and it appears to have been intended for the case of the children of natural born citizens, or of citizens who were original actors in our revolution, and therefore it was more comprehensive and more liberal in their favor. But the whole statute provision is remarkably loose and vague in its terms, and it is lamentably defective in being confined to the case of children of parents who were citizens in 1802, or had been so previously. The former act of 29th January, 1795, was not so; for it declared generally, that 'the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States.' And when we consider the universal propensity to travel, the liberal intercourse between nations, the extent of commercial enterprise, and the genius and spirit of our municipal institutions, it is quite

who is an alien, are aliens, if they be born abroad.¹ So, also, children born abroad of parents, who are in the service or under the allegiance of a foreign prince or king, or who have abjured their allegiance, and been naturalized in such country, are aliens; but children, born in England or America of aliens residing in the country, are entitled to all the privileges of citizens.² This rule obtains in France only upon condition that the child, after attaining the age of twenty-one years, claim the character of a Frenchman, by declaring his intention to fix his residence there, and actually so doing within a year from such declaration.⁶

§ 53. Where a subject of one country resides in an enemy's country voluntarily, without forcible detention, and carries on commerce there, he becomes an alien enemy.⁴ So, also, the same rule obtains where a neutral voluntarily resides in an enemy's country, and carries on trade there; ⁵ nor does it matter, in such cases, that he is there in the capacity of consul.⁶

§ 54. An alien friend may make any contract with a citizen, either within or without the country, and while the coun-

surprising that the rights of the children of American citizens, born abroad, should, by the existing act of 1802, be left so precarious, and so far inferior in the security which has been given under like circumstances, by the English statutes." This provision has, however, been held to be prospective in its operation. See *West v. West*, 8 Paige, R. 433; *Peck v. Young*, 26 Wend. R. 613.

¹ *Duroure v. Jones*, 4 T. R. 300; *Davis v. Hall*, 1 Nott & McCord, 292. The terms upon which an alien may become naturalized in the United States, are prescribed in the acts of Congress of April 14, 1802, ch. 28; March 3, 1813, ch. 184; March 22, 1816, ch. 32; May 26, 1824, ch. 186; May 24, 1828, ch. 106.

² 1 Black. Comm. 374.

³ Code Civile, L. 1, tit. 1, 9.

⁴ *O'Mealey v. Wilson*, 1 Camp. R. 482; *McConnell v. Hector*, 3 B. & Pul. 113.

⁵ *Ibid.*

⁶ *Albrecht v. Sussman*, 2 Ves. & Beam. 323.

try of which he is a citizen is at peace with the country of which the other party is a citizen, such contract may be enforced by legal process.¹ But during a war between the two countries, his legal right to sue upon such contract is suspended, and only revives with the return of peace.² A contract, which has been entered into between citizens of different nations during war, is utterly void, and does not become binding on return of peace; for the law declares such contracts to be illegal, on the ground, that the alien enemy is thereby enabled to withdraw from the country its resources of defence, and to convert them to purposes injurious to its interests.³ Yet if such alien enemy reside within the United States or in England, and be within the protection and license of the government, his contract may be enforced.⁴ No valid contract, however, except for the payment of ransom money, whether express or implied, can subsist between a citizen of the United States and an alien enemy, unless by permission of the government.⁵ But a contract made by a neutral with a citizen in an enemy's country is valid, and a suit thereon may be maintained in the courts both of England and of the United States.⁶

¹ Bacon's Abr. Alien, D.; Chitty on Cont. 181.

² Bacon's Abr. Alien, D.; Ex parte Boussmaker, 13 Vesey, 71; Flindt v. Waters, 15 East, 260; 7 Taunt. 439 (Am. ed.) and note; 10 Johns. 69; The ship Francis, 1 Gall. 448. "By the general law a state of war puts an end to all executory contracts between the citizens of the different countries. Whatever contract remains then '*in fieri*,' is either suspended or dissolved *flagrante bello*." Buchanan v. Curry, 19 Johns. 138.

³ Willison v. Patterson, 7 Taunt. R. 439; Brandon v. Nesbitt, 6 T. R. 23.

⁴ Comyn, Dig. Tit. Alien, C. 5; Wells v. Williams, 1 Salk. 46; Boulton v. Dobree, 2 Camp. 163; Chitty on Prerog. 48, 49.

⁵ Comyn, Dig. Tit. Alien, C. 5; Griswold v. Waddington, 15 Johns. 57; s. c. 16 Johns. 438; Musson v. Fales, 16 Mass. 334; The Francis and Cargo, 1 Gall. 448; The Rapid, 8 Cranch, 155; The Alexander, 8 Cranch, 169; The Julia, 8 Cranch, 181.

⁶ Houriet v. Morris, 3 Camp. 303. An alien cannot take lands by the act of the law, but only by the act of the party. He cannot, therefore, take lands by descent, curtesy, dower, or guardianship, but he may by purchase, whether

§ 54 *a*. Indeed, generally, an alien friend may, when injured, bring any personal action which a citizen can; and although he is not admitted to the same political and municipal rights as a citizen, yet he is equally entitled with him to the protection of his person and property, and may bring suits in the courts of the United States and of the States, to vindicate his rights or to redress his wrongs.¹ He may, therefore, take advantage of the insolvent laws of the State in which he

it be by grant or by devise. The theory of the common law is, that he does not take lands for his own benefit, but for the benefit of the State, and therefore he cannot hold them against the State. But, as he is trustee for the State, no one can disturb him in his title and possession, except the sovereign power. Co. Litt. 2 (b.); 129 (b.); 14 Hen. IV. 20; Dyer, 2 (b.). Until inquest or office found, therefore, he occupies the same position as every other person holding land, and may defend his title in a real action against all persons but the sovereign, during his life. Upon his death, however, the sovereign becomes seized without office found, because his freehold cannot be inherited by his blood, and it therefore would be in abeyance. During his life, he has complete dominion over it, and may convey the same to a purchaser; but the purchaser, in such case, would take it subject to seizure by the sovereign, after office found. *Fox v. Southack*, 12 Mass. 143; *Sheaffe v. O'Neil*, 1 Mass. 256; *Knight v. Duplessis*, 2 Ves. 360; *Powell on Devises*, 316; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, R. 603; *Jackson v. Clarke*, 3 Wheat. R. 1; *Craig v. Radford*, 3 Wheat. R. 594; *Orr v. Hodgson*, 4 Wheat. R. 453; *Doe d. Gouverneur's Heirs v. Robertson*, 11 Wheat. R. 332; *Fish v. Klein*, 2 Meriv. 431. But in Kentucky an alien, who has resided in the State two years, may take lands by purchase or descent. *Trustees v. Gray*, 1 Litt. 749. In Massachusetts an alien may take real estate by devise or deed, but it is defeasible by the State, and if he die intestate and seized of real estate, it immediately vests in the commonwealth, without office found. *Waugh v. Riley*, 8 Metcalf, R. 295; *Slater v. Nason*, 15 Pick. R. 345. In North Carolina an alien may take land by purchase, but not by devise, nor by inheritance. 3 Iredell, R. 141; 2 Haywood, R. 37, 104, 108. In New York a devise to an alien is void by statute. 2 N. Y. Rev. Stat. § 4, p. 57. In Louisiana, aliens may inherit and transmit real estate. *Duke of Richmond v. Milne*, 17 Louisiana, R. 312.

¹ *Taylor v. Carpenter*, 2 Woodbury & Minot, 15; *Barry's case*, 2 Howard, S. C. R. 65; *Ibid.* 5; *Howard*, S. C. R. 103; *De La Vega v. Vianna*, 1 Barn. & Adolph. 284; *Judiciary Act*, section 11; *Russell v. Skipworth*, 6 Binn. R. 241; *Clarke v. Morey*, 10 Johns. R. 69.

is resident;¹ and he is entitled to the same protection as citizens against frauds practised on him. Thus, where the plaintiffs were manufacturers in England of "Taylor's Persian Thread," and the defendants, in America, imitated their names, trademarks, envelopes, and labels, and placed them on thread of a different manufacture, it was held that the plaintiffs could recover for the fraud, although they were aliens.²

§ 54*b*. The question whether an alien is at liberty to renounce all allegiance to the United States, at his pleasure, has been much discussed, and considerable difference of opinion has been expressed.³ The rule of the common law is, that natural-born subjects owe a perpetual allegiance, which cannot be divested by any act of their own, unless authorized specially by legislative provisions.⁴ But it has been doubted whether this strict rule was applicable to this country. Mr. Chancellor Kent, after a historical review of all the cases in the Federal Courts, states that "the better opinion would seem to be that a citizen cannot renounce his allegiance to

¹ Judd v. Lawrence, 1 Cushing, R. 531.

² Taylor v. Carpenter, 3 Story, R. 458. Mr. Justice Story, in this case, said, "Various grounds of objection are suggested in the answer of the defendant, none of which appear to me to be of any validity. First, it is suggested that the plaintiffs are aliens. Be it so. But in the courts of the United States, under the Constitution and Laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretence to say, that if a similar false imitation and use of the labels of a citizen put upon his own manufactured articles, had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his rights, for which our law would have granted ample redress. There is no difference between the case of a citizen and that of an alien friend, where his rights are openly violated." See also Coats v. Holbrook, 2 Sandf. Ch. R. 586.

³ Talbot v. Johnson, 3 Dall. R. 133; The case of Isaac Williams, 2 Cranch, R. 82, note; Murray v. The Charming Betsey, 2 Cranch, R. 64; United States v. Gillies, 1 Peters, C. C. R. 159; Santissima Trinidad, 7 Wheat. R. 283; Ainslie v. Martin, 9 Mass. R. 454-461.

⁴ Story's Case, Dyer, R. 298 b., 300 b.; 1 Black. Comm. 370, 371; 1 Hale, P. C. 68; Foster's Crown Law, 7, 59, 183.

the United States without the permission of government, to be declared by law, and that as there is no legislative regulation in this case, the rule of the English common law remains unaltered.¹

INFANTS.

§ 55. The next class of persons legally disabled from contracting, except under certain limitations, is that of infants. Human life is divided into four periods, each of which is a multiple of seven. Natural infancy ends at seven years; puberty begins at fourteen years; legal infancy ends at twenty-one years; and the natural life of a man is threescore years and ten.² The law takes no cognizance of the acts or contracts of persons under seven years of age, whether they be civil or criminal. After seven years, any person may be capitally punished and may make voidable contracts. After fourteen years, which is the age of discretion, any person may become executor or executrix, and is presumed to have authority to make a will. But until a person is twenty-one years of age, he is a legal infant, and is incapable of making a binding contract. Before then, the law presumes his faculties to be immature, undisciplined, and incompetent to guard against artifice and subtlety, and it therefore extends to all contracts, previously made, its protection and guardianship.³ A person is of full age to contract on the day preceding his

¹ 2 Kent, Comm. Part IV., Lect. 25, p. 49. See also, *Shanks v. Dupont*, 3 Peters, S. C. R. 242, and *Inglis v. The Trustees of the Sailors' Snug Harbor*, Ibid. 99. The naturalization laws of the United States, requiring the alien who is to be naturalized to abjure his allegiance, without evidence of a release by his sovereign, would seem to be inconsistent with this doctrine; as would also the rule, which was held in *United States v. Wyngall*, 5 Hill, N. Y. R. 16, that an alien may enlist in the army of the United States, and his contract will be valid.

² So, also, a person not heard from during seven years, is presumed to be dead.

³ Co. Litt. 172, 381; Bacon, Abr. Infancy and Age, L. 3.

twenty-first birthday, and it has been adjudged, "that if one be born on the first day of February, at eleven at night, and on the last day of January, in the twenty-first year of his age, at one of the clock in the morning, he make a will of land, and die, 'tis a good will, for he was then of age."¹ This rule has, by some writers, been thought to have originated in the feudal law, by which the authority of the guardian in chivalry continued until his male ward arrived at the age of twenty-one years, because, until then the ward was incapable of doing knight-service and attending his lord to the wars. But the suggestion of Sir William Blackstone, that this rule was probably copied from the old Saxon constitution on the continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt*," seems to have more weight.² Probably the original reason upon which the rule was founded was a physical one, for, according to Pliny, "*Homo crescit in longitudinem ad annos usque ter septenos*." The age at which persons are competent to contract is different in different countries. By the Roman law, full age is fixed at twenty-five years, and such is generally the law on the continent of Europe. But in France, twenty-one years is the age of majority.³ In the United States, the rule of the common law, making twenty-one years the age of majority, generally obtains, although in some of the States, female infants attain their majority at the age of eighteen years.⁴

¹ Anon. 1 Salk. 44; *Roe v. Hersey*, 3 Wilson, 274; *Fitzhugh v. Dennington*, 6 Mod. 260. See Bingham on Infancy, [American ed., and the valuable notes of Mr. Bennett,] and Macpherson on Infancy, for a full discussion of the law applicable to Infants.

² 1 Black. Comm. 464.

³ Code of France, Art. 488: "La Majorité est fixée à vingt-un ans accomplis; à cet âge on est capable de tous les Acts de la vie civile sauf la Restriction portée au Titre du Mariage."

⁴ This is the case in Vermont and Ohio, 9 Verm. R. 42, 79; 2 Kent, Comm. Lect. 31, p. 231.

§ 56. The law allows to infants certain privileges, as a security against that imposition, to which they are peculiarly open from their ignorance and inexperience, and in respect of which they stand in need of protection and guardianship. These privileges are, however, entirely personal, and can only be taken advantage of by the infant himself; for, inasmuch as the reason for which they are allowed does not apply to any party of full age, they are therefore denied to him.¹ If, therefore, any person, being of full age, enter into an agreement with an infant, he is bound thereby, despite the want of reciprocal responsibility, and it is only at the option of the infant or his representatives to avoid it.² Thus, where an adult promised a minor to marry her, it was held, that she could maintain an action against him for breach of promise, although he could not against her.³ So, also, in another case, an infant was allowed to maintain an action for money advanced on a crop of potatoes sold to him by an adult, although the adult could not have maintained an action against him.⁴ This rule is founded upon the theory, that the adult has entered into the contract with all the experience and knowledge requisite to counteract fraud and imposition, while the infant is presumed to be flexible of purpose, easily persuadable, and susceptible of influences which may be greatly injurious to his rights. So, also, for the same reason, a third person, not a party to the contract, cannot take advantage of the infancy of one of the parties to avoid it, unless it be void in its inception.⁵

¹ Bac. Abr. Infancy and Age, A. 1; Co. Litt. 78 (b), 171 (b); *Oliver v. Houdlet*, 13 Mass. 240; *Whitney v. Dutch*, 14 Mass. 463; 2 Black. Comm. 67.

² *Coan v. Bowles*, 1 Shower, 171; *Vanbramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. 160; 2 Inst. 483; *Rose v. Daniel*, 2 Const. Rep. (S. C.) 549; *U. S. v. Bainbridge*, 1 Mason, 71; *Comyn on Cont.* 153; Bac. Abr. Infancy and Age, I. 4. Yet as the remedy is not mutual, a court of equity will refuse to decree specific performance, at the suit of the infant. *Flight v. Bolland*, 4 Russell, 298; *Thompson v. Hamilton*, 12 Pick. R. 429.

³ *Holt v. Ward*, 2 Strange, R. 937.

⁴ *Warwick v. Bruce*, 2 Maule & Selw. 205.

⁵ *Keane v. Boycott*, 2 H. Black. 511; *Bacon's Abr. Infancy and Age*, I. 4;

§ 57. The contracts of infants are divided into three classes, namely, first, those which are absolutely void; second, those which are only voidable; and third, those which are binding. And, in the first place, if they be positively injurious to the interests of the infant, and can only operate to his prejudice, they are absolutely void; for in such case, the presumption is almost irresistible, that some unfair advantage has been taken of him, or some injurious influence has been exerted. The only difference in this respect between the contracts of adults and infants, is, that in the one case injury is only evidence of imposition, while in the other it is allowed as an uncontrollable presumption thereof, because of the inexperience of the infant.¹ Thus where a bond is executed by him as surety, inasmuch as it cannot be for his benefit, it is void;² or where a release is made by him to his guardian, it is also void.³

§ 58. But, in the second place, where the contract may be beneficial to the infant, it is only voidable, and may be affirmed or avoided by him when he becomes of age.⁴ For, inas-

Oliver v. Houdlet, 13 Mass. R. 237; *Kendall v. Lawrence*, 22 Pick. R.; *Nightingale v. Withington*, 15 Mass. R. 272; *Worcester v. Eaton*, 13 Mass. R. 371.

¹ *Zouch v. Parsons*, 3 Burr. 1794; *Keane v. Boycott*, 2 H. Black. 511; *Bac. Abr. Infancy and Age*, I. 3; *Whitney v. Dutch*, 14 Mass. 457; *Oliver v. Houdlett*, 13 Mass. 239; *Shep. Touch.* 232; *Tucker's Lessee v. Moreland*, 10 Peters, R. 59; *The King v. Shinfield*, 11 East, 541; *U. S. v. Bainbridge*, 1 Mason, 82; *Fridge v. The State*, 3 Gill & Johns. 103.

² But see *Hinely v. Margaritz*, 3 Barr. R. 428.

³ *Keene v. Boycott*, 2 H. Black. R. 511; *Tucker's Lessee v. Moreland*, 10 Peters, R. 59; *Bingham on Infancy*, 11; *Baker v. Lovett*, 6 Mass. 78; *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dinely*, 3 Maule & Selw. 477; *Allen v. Miner*, 2 Call, 70; *Colcock v. Furguson*, 3 Dessaus. 482; *Fridge v. The State*, 3 Gill & Johns. 115; *Vent v. Osgood*, 19 Pick. R. 572; *Baker v. Lovett*, 6 Mass. R. 78.

⁴ *Zouch v. Parsons*, 3 Burr. 1808; *Keane v. Boycott*, 2 H. Black. R. 511; *Maddon v. White*, 2 T. R. 161; *Boston Bank v. Chamberlin*, 15 Mass. 229; *Whitney v. Dutch*, 14 Mass. 462; *Oliver v. Houdlet*, 13 Mass. 239; *Tucker's Lessee v. Moreland*, 10 Peters, R. 59; *Bruce v. Warwick*, 6 Taunt. R. 118;

much as the privilege of infants is given by the law only as a protection against the impositions of crafty and designing persons, it does not render those contracts void, which may manifestly enure to the benefit of the infant, and may be intended by the other party as an advantage to him. This class includes the greater part of those contracts which may be entered into by an infant; for it is the policy of the law not to encumber his free action by disabilities, but only to allow him the right to suspend his ultimate decision, upon a doubtful question of benefit, until he shall be of full age and placed on a footing similar to that of the other contracting party. His own power of deciding the question of advantage is not extinguished, except in cases which are necessarily injurious to his interests; but in respect to all questions which may be beneficial, he has the right of ratifying them as soon as he is presumed to be able so to do. The courts lean to construing the acts and contracts of infants to be only voidable, and not void.¹ Thus the deed of an infant conveying lands, is voidable only, unless it should appear on its face to be to the prejudice of the infant, upon the ground of the solemnity of the instrument.² So, also, a promissory note or bill of exchange made by an infant, which was long considered to be void, is now held to be only voidable,³ and an account stated

s. c. 2 Maule & Selw. 205; *Fisher v. Jewett*, Berton, R. 35; *Kendall v. Lawrence*, 22 Pick. R. 544.

¹ *Cole v. Pennoyer*, 14 Illinois R. 138; *Cummings v. Powell*, 8 Texas R. 80; *Fonda v. Van Horne*, 15 Wend. R. 631, 635; *Breckenbridge's Heirs v. Ormsby*, J. J. Marsh. (Ky.) R. 236; 1 Am. Leading Cases, 103, 104.

² *Boston Bank v. Chamberlin*, 15 Mass. R. 220; *Tucker v. Moreland*, 10 Peters, 71; 2 Kent's Comm. Lect. 31, p. 234, 235; *Zouch v. Parsons*, 3 Burr. 1804; *Worcester v. Eaton*, 13 Mass. R. 371; *Kendall v. Lawrence*, 22 Pick. R. 540; *Booe v. Mix*, 17 Wend. R. 119; *Gillet v. Stanley*, 1 Hill, R. 121.

³ *Goodsell v. Myers*, 3 Wend. 479; *Fisher v. Jewett*, Berton, R. 35; *Lawson v. Lovejoy*, 8 Greenleaf, 405; *Dubose v. Wheddon*, 4 McCord, 221; *Wright v. Steele*, 2 N. Hamp. 51; *Whitney v. Dutch*, 14 Mass. 462; *Reed v. Batchelder*, 1 Metcalf, R. 459; *Story on Bills of Exchange*, § 84; *Earle v. Reed*, 10 Metcalf, R. 389; but see *contra*, *Swaysey v. Vanderheyden*, 10 Johns.

is now held to be only voidable, and may be ratified by him on his arriving at full age, and if he do so ratify it, an action of debt, as well as of assumpsit, may be maintained upon it.¹ So, also, a contract of partnership by an infant,² or a bond made by him,³ are merely voidable, and not void.

§ 59. An exception to this rule obtains, however, in the case of a power of attorney, executed by an infant, which is treated as utterly void,⁴ although upon what ground it is difficult satisfactorily to determine. The point, however, is settled, and an authority so delegated, even though it enure to the benefit of the infant, is a nullity, and cannot be rendered valid by a subsequent ratification. Yet a power of attorney, authorizing another to receive seizin of land for an infant, or to complete his title to an estate, conveyed to him by feoffment, is only voidable, because it is for the interest of the infant, and comes within the rule.⁵

§ 60. An infant may not only refuse to perform his executory contracts during his infancy,⁶ but he may disaffirm them when he comes of age, and leave the other party remediless. As when he borrows money and expends it, or purchases goods and sells them, or consumes them, or makes a promis-

R. 33; *M'Crillis v. Howe*, 3 N. Hamp. R. 348; *M'Mian v. Richmond*, 6 Yerg. R. 1.

¹ *Williams v. Moor*, 11 Mees. & Welsb. 256.

² *Goode v. Harrison*, 5 Barn. & Ald. 147.

³ *Conroe v. Birdsall*, 1 Johns. Cases, 127; *Curtin v. Patton*, 11 Serg. & Rawle, 309; *Fisher v. Mowbray*, 8 East, R. 300; *Bingham on Infancy*, ch. 2, § 3; *Hinely v. Margaritz*, 3 Barr, R. 428.

⁴ *Bac. Abr. Infancy and Age*, I. 3; *Saunderson v. Marr*, 1 H. Black. 75; *Finch's Law*, 102; *Keane v. Boycott*, 2 H. Black. 54; *Tucker's Lessee v. Moreland*, 10 Peters, R. 59; *Eagle Fire Co. v. Lent*, 6 Paige, R. 635.

⁵ *Bro. Abr. Taits*, 31; 1 *Roll. Abr.* 730; *Zouch v. Parsons*, 3 Burr. 1808; 1 *Woodeson*, 400.

⁶ *Heath v. Wait*, 6 Foster, R. 193; *Carr v. Clough*, *Ibid.* 280; *Knox v. Flack*, 10 Harris, R. 337.

sory note, he cannot be compelled to pay, even though he have received all the benefit thereof; and the plea of infancy is a perfect defence both for the infant and his representative.¹

§ 61. So, also, where the contract is executed, he may ordinarily disaffirm it at any time; as where he sells any article, he may reclaim it upon tendering the price he paid;² or if he lease lands, he may receive the rent and suffer the lessee to remain, or he may rescind the contract, and treat the lessee as a trespasser.³ And if he convey by bargain and sale, he may avoid such conveyance without entry, or he may convey to another person without notice to the first purchaser.⁴ Again, an infant may avoid his special agreement even though it be an entire contract, when partially executed, and recover a reasonable compensation for services actually performed, in like manner as if no such special agreement had been made.⁵ But if the other party suffer injury from the failure of the infant to perform his contract, this fact should be taken in reduction of the compensation. And if it should appear that his services were, under the circumstances, of no value, he could recover nothing.⁶

§ 61 *a*. But where a contract is completely executed, and it

¹ 20 Am. Jur. 257.

² *Willis v. Twambley*, 13 Mass. 294; *Badger v. Phinney*, 15 Mass. 359; *Hubbard v. Cummings*, 1 Greenl. 13; *Roof v. Stafford*, 7 Cow. 183; *Carr v. Clough*, 6 Foster, R. 280; *Wheatley v. Miscal*, 5 Porter, R. 142.

³ *Blunden v. Baugh*, Cro. Car. 303, 306.

⁴ *Stearns on Real Actions*, 186; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124. But see *Roberts v. Wiggin*, 1 N. Hamp. R. 75.

⁵ *Moses v. Stevens*, 2 Pick. R. 332; *Vent v. Osgood*, 19 Pick. R. 572; *Judkins v. Walker*, 17 Maine R. 38; *Bishop v. Shepard*, 23 Pick. R. 492. But see *Weeks v. Leighton*, 5 N. Hamp. 343; and *McCoy v. Huffman*, 8 Cowen, R. 84. But see *Whitmarsh v. Hall*, 3 Denio, R. 375.

⁶ *Thomas v. Dike*, 11 Verm. R. 273; *Moses v. Stevens*, 2 Pick. R. 332.

appears that it was beneficial to the infant, and was entered into *bonâ fide*, the infant cannot rescind it, unless he can place the other party *in statu quo*. Thus, where money and articles and outfit were advanced to an infant to enable him to go to California and labor, the infant agreeing to give as compensation therefor, one third of all the avails of his labor, and a settlement was made and the money paid over, it was held that the infant could not rescind the agreement and recover the sum paid, deducting the money advanced and the value of the outfit, — the whole circumstances showing the contract to be perfectly fair and reasonable, and beneficial to the infant, and the proposed arrangements not being such as would put the other party *in statu quo*.¹ So, also, where a special contract

¹ *Breed v. Judd*, 1 Gray, R. 457. The court said, "But what was the contract? In substance and effect, it was that the defendants should furnish the outfit, and that the plaintiff should furnish his labor and time, and that of the fruits of the enterprise the plaintiff should have two thirds and the defendants one third. The amount of the outfit furnished does not appear, but it does appear that the contract was reasonable and beneficial to the infant. No time was prescribed for the plaintiff to be absent. He was, in fact, absent nine months. The contract was fully executed; the defendants received their share of the fruits of the enterprise, the plaintiff retained his. The case has been argued as if the gold dust were the result of the plaintiff's labor alone; whereas it was the result of the union of the labor of the plaintiff and the capital of the defendants. The offer of the plaintiff to deduct, from the sum to be recovered, the amount paid for his outfit and expenses, would not place the parties *in statu quo*. The defendants took the risk of the life, health, and good fortune of the plaintiff. If the enterprise had wholly failed, they would have had no claim upon the plaintiff for remuneration, and the capital advanced would have been wholly lost. To make the defendants whole, they must be compensated for the risk assumed, and under all the circumstances of the case the sum advanced was deemed a reasonable consideration for a third part of the proceeds of the plaintiff's labor. The measure of compensation is to be determined, not by the result, but by the circumstances existing when the agreement was made. It may be suggested that this construction of the agreement makes the contract of the parties one of partnership, and that by a contract of partnership an infant cannot be bound. So long as the contract remains executory, this is true. After the plaintiff had received the defendants' money for his outfit and voyage, he could not have been compelled to

has been made and executed on both sides, the infant cannot, upon coming of age, claim to receive additional compensation, if there were no fraud or overreaching in the bargain. Thus, where an infant of fourteen years of age entered into an agreement to work until he should arrive at full age, in consideration of being furnished with board, clothing, and education, during such time, and the terms of the contract did not indicate any fraudulent advantage taken of him, and were sanctioned by the guardian, and the contract was wholly performed on both sides, it was held, that the infant could not maintain a *quantum meruit* for his services, merely by showing, that by reason of the events which had happened, his services were worth more than the stipulated compensation.¹

§ 62. Where the contract is executory on the part of the adult, if it be disaffirmed by the infant, he is also discharged from the performance of his part of the agreement. And if, in such a case, the infant have advanced the consideration, he may, upon disaffirmance of the contract, recover it. Thus, where an infant purchased a share in the defendant's trade,

perform the contract and go to California. Upon his arrival there, he might have elected to rescind the contract. He might, at his own pleasure, have terminated the agreement. But he chose to do none of these, but to proceed and perform his agreement, and to pay over to the defendants their just proportion of the proceeds of the business. And we know of no ground, upon which, after arriving at full age, he can change the entire character of a contract so made and executed, treat the money so advanced by the defendants as a simple loan, and claim for himself all the fruits of an enterprise in which their money and his labor were the common stock, and this when the contract as originally made, is found to have been fair, reasonable, and even beneficial to the plaintiff." "If the contract set up by the defendants could, even after being fully executed, be rescinded, it seems to be conceded this could only be by putting the defendants *in statu quo*. If this includes, as seems to be obviously just it should, a fair compensation for the risk they necessarily incurred, the result would be only to come back to the starting-point, the jury having found the agreement, under all the circumstances, a reasonable one."

¹ *Stone v. Dennison*, 13 Pick. R. 1. See also *Breed v. Judd*, 1 Gray, R. 455, 459.

and advanced a certain sum thereupon, to be retained by the defendant as a forfeiture, in case the infant should fail to fulfil an agreement to enter into partnership with the defendant, and he did fail so to do it, it was held that the infant could recover it.¹ But where the contract is executory on the part of the infant, and has been executed by the adult, and the infant refuses to complete his contract, it has been said, that there is no remedy by which the adult can recover the consideration paid.² But the cases do not support this assertion in its full extent. The true rule seems to be, that when articles are furnished to the infant, which do not come within the definition of "necessaries" and which are consumed or parted with,—or when money is lent, which is expended by the infant,—that the other party has no remedy to recover an equivalent for the goods or the money, if the specific consideration given by him have been parted with, or be incapable of return.³ But wherever that specific consideration, whatever it be, exists, and remains in the hands of the infant, at the time of his disaffirmance of the contract, and is capable of return, the infant is bound to give it up, and he is treated as a trustee of the other party, if the contract be made originally in good faith.⁴ The ground of such a distinction is, that in the first case, the goods or money cannot be returned, and to make the infant liable therefor, in damages, merely because they had been used by him, would be to deprive him of his privilege of affirming or avoiding his contract entered into *bonâ fide*, when it was impossible for him to return the actual consideration. But in

¹ Corpe v. Overton, 10 Bing. R. 252; s. c. 3 M. & Scott, 738.

² 20 Am. Jurist, 260; Shaw v. Boyd, 5 Serg. & Rawle, 309, where an infant received \$500 for giving a bond to release dower, and yet recovered dower without refunding the money. Crymes v. Day, 1 Bailey, 320; Jones v. Todd, 2 J. J. Marsh. 361.

³ Probart v. Knouth, 2 Esp. 472, note; Earle v. Peale, 1 Salk. 386; Darby v. Boucher, 1 Salk. 279.

⁴ Badger v. Phiuncy, 15 Mass. 359; Willis v. Twambly, 13 Mass. 204; Reeves's Domestic Relations, Parent and Child, 245.

the other case, where the actual consideration remains in the hands of the infant, and can be returned, it would be a *tort* in him to retain it, and his privilege is, as Lord Mansfield has said, to be used as a shield and not as a sword. The moment the infant disaffirms a contract, the parties stand upon the same footing, and the rights to property in the subject-matter of the contract remain the same, as if no contract had been made. In the one case, then, upon disaffirmance of the contract, the subject-matter, as between these parties, would not be in existence, and could not be returned, and the damage must be borne by him who incurred the risk. But, in the other case, the subject-matter would belong to the adult as much as it ever did, and the retaining of it by the infant would be tortious, and an action of replevin would therefore lie.¹ The very ground upon which the infant ever held the goods, namely, the contract, being gone, he can have no legal title to them afterwards. For the same reasons, where money is paid by an adult upon an executory contract to be performed by the infant, he cannot compel the infant to perform it, although the money has been expended by the infant.

§ 63. Every person deals with an infant at arm's length, at his own risk, and with a party for whom the law has a jealous watchfulness. But although an adult cannot enforce an executory contract, upon which he has advanced the consideration, nor recover in an action of *assumpsit*, where the specific and identical consideration has been parted with by the infant; yet this rule operates in some measure reciprocally; for if the infant have already advanced money upon a contract which is executory on the part of the adult, he cannot disaffirm it, and sue the other party for the advance, if it were paid on a valuable consideration which has been partially enjoyed, and especially if he had received the benefit of his con-

¹ *Badger v. Phinney*, 15 Mass. 359; *Shannon v. Shannon*, 1 Sch. & Lef. 324; *Illsley v. Stubbs*, 5 Mass. 284.

tract.¹ As, where an infant advanced money on a lease, and subsequently, on coming of age, disaffirmed it and sued the lessor for the sum advanced; it was held, that he could not recover.² Where the contract is executed on both sides, an infant, when he comes of age, cannot disaffirm it, without returning the consideration;³ for although, if the consideration had not been paid, it could not be recovered, because the infant is an irresponsible person, yet it is but just and equitable, that if he has only paid for what he has enjoyed, he should not be entitled to reclaim his money without refunding the consideration of it. In such a case, if he could, it would clearly operate as a direct fraud.⁴ The law does not render an infant responsible for his promises to do; but it does make him liable for his acts already done, when he has received the equivalent therefor, and cannot return it.

§ 64. The privileges, with which the law invests the infant, are merely additional to the rights which he enjoys in common with adults. If he have paid money on a consideration which has failed, he may reclaim it, and he may always have a remedy against fraud.⁵

§ 65. Infancy cannot, however, be pleaded as a defence to

¹ 20 Am. Jur. 260; 2 Kent's Comm. Lect. 31, p. 340; *Earl of Buckinghamshire v. Drury*, 2 Eden, 72; s. c. *Wilmot*, R. 226, note; *McCoy v. Huffinan*, 8 Cowen, 84; *Roof v. Stafford*, 7 Cowen, 184; *Weeks v. Leighton*, 5 N. Hamp. 343; *Holmes v. Blagg*, 8 Taunt. 35, 508; *Wilson v. Kease*, Peake's New Cases, 190; *Kirton v. Elliott*, 2 Bulst. 69; *Corpe v. Overton*, 10 Bing. R. 252.

² *Holmes v. Blogg*, 8 Taunt. 35, 508; s. c. 1 Moore, R. 468; s. c. 2 Moore, R. 552. See, however, *Moses v. Stevens*, 2 Pick. 332.

³ *Breed v. Judd*, 1 Gray, R. 458; *Bailey v. Bainberger*, 11 B. Munroe, 113; *Cummings v. Powell*, 8 Texas, R. 80; *Bartholomew v. Finnemore*, 17 Barb. R. 428; Ante, § 61 a.

⁴ 2 Kent's Comm. Lect. 31, p. 240; *Earl of Buckingham v. Drury*, 2 Eden, R. 72.

⁵ *Bruce v. Warwick*, 6 Taunt. 120; *Corpe v. Overton*, 10 Bing. 252.

actions which are founded in tort, but only to actions which are founded in contract. Thus, an infant is liable in trover for a tortious conversion of goods intrusted to his care.¹ So, also, he is personally answerable for slander, or assault, or trespass; for his privilege is no protection against his direct misdeeds and offences.² But where an action against an infant is founded solely in contract, it cannot be converted into a tort by the plaintiff, so as to charge the infant *ex delicto*, for, otherwise, the protection which the law affords to him might be frustrated by the mere form of action.³ Thus, where the plaintiff delivered a mare to the defendant, who was an infant, to be moderately ridden by him, and the mare having been injured while in his hands, an action was brought charging him *ex delicto*; it was held, that the defendant might plead his infancy in bar, inasmuch as the matter was founded purely in contract, and the injury could only be a subject for damages.⁴ For the same reason he would not be liable *in delicto* on a false and fraudulent warranty.⁵ Although the action, however, be brought in assumpsit, if it be really founded in tort, so that an action *ex delicto* might be brought against the infant, the mere form of the action will not afford a right to him to set up his infancy as a defence.⁶ Thus, where an action of assumpsit for money had and received was brought against an infant, to recover money which he had fraudulently embezzled, it was held, that the defendant could not plead his

¹ *Homer v. Thwing*, 3 Pick. R. 492; *Bristow v. Eastman*, 1 Esp. R. 172; *Mills v. Graham*, 4 Bos. & Pul. 140; *Peigne v. Sutcliffe*, 4 McCord, R. 387; *Green v. Sperry*, 16 Verm. R. 390; *Brown v. Maxwell*, 6 Hill, R. 592; *School Dist. v. Bragdon*, 3 Foster, R. 511; *Towne v. Wiley*, 23 Verm. R. 355.

² *Jennings v. Rundall*, 8 T. R. 337; *Vasse v. Smith*, 6 Cranch, 226; 2 Kent's Comm. Lect. 81, p. 240, 241.

³ And a promissory note to compromise a tort would be no more binding than any other. *Hincks v. Deal*, 3 McCord, R. 257.

⁴ *West v. Moore*, 14 Verm. R. 444; *Morrill v. Oden*, 19 Ibid. 505.

⁵ *Jennings v. Rundall*, 8 T. R. 337.

⁶ *Vasse v. Smith*, 6 Cranch, 226; *Bristow v. Eastman*, 1 Esp. 172.

infancy in bar, because the action was, in substance, an action *ex delicto*, for which an action of trover might have been substituted.¹ So, also, where goods were delivered to an infant who was master of a ship, under a contract, that he should carry them to a particular place, and they were wrongfully shipped by him to a different port, he was held liable in trover for the conversion.²

§ 66. If the infant have been guilty of positive fraud, and thereby imposed upon the other party to his injury, he cannot set up his infancy as a defence to an action for the consideration, although the matter be in contract; for by his fraud he has put himself without the pale of his privilege, and is responsible to the same extent, as if he were an adult. Fraud renders a contract void *ab initio*, and not voidable; and therefore, if the infant by fraudulent representations deceive the other party, and thereby induce him to part with his goods, such an agreement will be utterly void, and the infant will be liable in an action of trover for conversion. He cannot thereby take advantage of his own wrong. Thus, if a party falsely represent himself to be of age, and goods be sold to him upon faith of such a representation, for which he refuses to pay, on the score of infancy, the vendor may rescind the contract and retake the goods. If, in such a case, the goods be parted with, the infant is liable in trover for their value; upon the ground, that although he is not liable on account of his contract, he is chargeable because of his fraud, which is a tort.³ In such case there is no contract, because of the fraud, and the infant must be treated as a wrongdoer, who has improp-

¹ *Bristow v. Eastman*, 1 Esp. 172; s. c. *Peake's Cas.* 222.

² *Vasse v. Smith*, 6 Cranch, 226. See *Towne v. Willey*, 23 Verm. R. 353.

³ See *Cox v. Kitchin*, 1 Bos. & Pul. 338. Where a feme covert living separately from her husband, represented herself falsely to the tradesman to be a femme sole, and thereby obtained goods on credit, and it was held that she rendered herself personally responsible because of her fraud. The same doctrine would seem to apply to an infant.

erly got possession of the goods of the other party. Assumpsit is, however, an improper action, because it incidentally affirms the contract, or rather creates a new contract. Yet this fault of pleading will not destroy the liability of the infant, where the action is evidently founded in tort. The proper form of action is trover for the conversion of the goods, treating the case as if no contract had ever been made.¹

¹ The old cases upon this subject are irreconcilable, and tend, in most cases, directly to impugn the rule stated in the text. The earliest case, which has formed the basis of most of the subsequent decisions, is that of *Grove v. Nevill*, (1 Keble, R. 778, 913, 914,) in which the court held, that an infant was not liable in an action on the case in the nature of deceit, on a sale by the defendant, of goods as his own, whereas, in truth, they were another's. The defendant pleaded nonage, but the court said, this was "no actual tort or any thing *ex delicto*, but only *ex contractu*, which is voidable by plea, but is a tort by construction of law." Windham doubted, however. The ground of this doctrine was, that when an action is strictly founded in contract, the plaintiff shall not, by changing the form of action from contract to tort, deprive the infant of his privilege of pleading infancy as a bar. This, unquestionably, is a correct rule, and the only question is, whether this case was founded in contract or in tort. If the representation were fraudulent, it certainly was a tort—in point of fact as well as by construction of law—and if only the latter, why was not the action well founded? The next case was the case of *Manby v. Scott*, (1 Sid. 129,) in which it is said, "If one deliver goods to an infant, on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion, for by this means all infants in England would be ruined." But a query is there raised, whether, if "the goods were delivered to an infant, not knowing him to be an infant, it would not be otherwise." The point, therefore, herein indicated, is, that the mere ignorance of the adult, as to the fact of the infancy of the other party when the contract was made, might perhaps be a ground to sustain the action of trover. The proposition, that if a man trust an infant, knowingly, he cannot sue for the goods in trover, is undeniable. This case, in as far as it goes, supports the doctrine of the text; but the question did not arise in this case as to the liability of an infant, and the remarks cited above are mere *dicta*. The next case is that of *Johnson v. Pye*, (1 Keble, R. 905, 913; s. c. 1 Sid. R. 258; 1 Lev. 169,) where an infant, falsely affirming himself to be of full age, executed a mortgage which he afterwards sought to avoid, and the court held, that he might plead his infancy in bar to an action on the case. The court proceeded, in this case, upon the ground that the affirmation being by

§ 67. We next come to the consideration of the subject of *Ratification by an Infant*. A void contract is incapable of

an infant, was void, and was not like trespass, felony, &c., for there is a fact done. Twisden, J. doubted, and thought the infant liable, in like manner as he would be for trespass and cheating with false dice. This, in truth, seems to be the only equitable view of the case. For if a contract be made with an infant, upon the ground of an affirmation by him, that he is of full age, it is a clear and unmitigated case of fraud, within the very definition of the term, being a deceitful representation of a material fact, which would have operated strongly to influence the decision of the party deceived, and of which his ignorance was his injury. In such a case of fraud, therefore, what pretence is there that any contract ever existed? By one of the very first principles appertaining to contracts, it was utterly null and void in its very inception, and was not merely voidable. What reason or justice is there in admitting an exception to this rule, by which an infant is allowed and prompted expressly to defraud other persons, and then take advantage of his own wrong? If it be true, that his privilege is to be used as a shield and not as a sword, what becomes of this technical and absurd refinement? If a wrongful and fraudulent representation lie at the bottom of a contract, the contract is founded upon fraud, that is, the tort is anterior to the contract, and the defence of infancy ought not, therefore, to be permitted on principle. In this case of *Johnson v. Pye*, the ground of the decision was, that the affirmation of the infant was void. This, however, does not by any means solve the difficulty. For, granting that the affirmation was void, yet if the contract were, nevertheless, founded upon that affirmation, the contract would be void also. If there were no contract, the property which the infant held in virtue of it, never belonged to him; he became the bailee or trustee of the other party, and the real owner might retake them at any time, or sue the infant for conversion. This reasoning is applicable to every other case of a similar nature, and why is it not applicable to the present? In this case the action was in tort, and there was not even the plausible reason, which might have been given, had the action been brought in assumpsit, namely, that the contract was affirmed by the pleadings. This objection, however, as we have seen, ought not to have operated, for if the matter was founded in contract, the contract was nevertheless founded in tort, and tort therefore is the ground of the whole action. This is a doctrine of an old case, *Furnes v. Smith*, (1 Roll. Abr. 530,) where a suit was held to lie in the admiralty in the nature of detinue or trover against the master of a ship, (who was an infant, although the fact was apparently unknown to the shipper,) for goods which he entered into a contract to carry to England, and did not deliver according to his agreement, having wasted and consumed them. And in this case the court of

ratification; for no promise can ever revive that which never had any existence. But a contract, which is merely voidable,

common law refused a prohibition. The same doctrine is held in *Bristow v. Eastman*, (1 Esp. R. 172; s. c. *Peake*, R. 225,) which is cited in the text; and where an infant was held liable for money received by him as an apprentice, and misapplied or embezzled, although the action was *assumpsit*. The reasoning of Sir James Mansfield, Ch. J., in *Mills v. Graham*, (4 Bos. & Pul. 140,) is directly coincident with the view just taken. In that case the defendant, being desirous to purchase some skins of the plaintiff, applied to the plaintiff to sell him some, which the plaintiff declined to do, but agreed to let him have some to finish, and promised to pay him therefor. The skins were delivered, and the plaintiff afterwards applied to the defendant to return them, offering to pay any thing that might be due. But the defendant refused then for the first time, and set up a plea of infancy. Sir James Mansfield held that *detinue* or *trover* would lie for the skins, and said, "He (the defendant) fraudulently received the goods, concealing the circumstances of his minority, and then fraudulently set up his minority as a defence against the plaintiff's just demand. The goods, being wrongfully in the defendant's hands from the beginning *without any valid contract* between him and the plaintiff, it seems that they must be considered in the same situation, as if the defendant had at first wrongfully gotten possession of them without pretence of bailment." "It is sufficient to say, that the goods did not come to the defendant, under what could properly be called a bailment. They came into his hands by fraud, and the right of the plaintiff must be considered just the same as if the goods had come to the defendant's hands, without pretence of right or delivery." The case of *Jennings v. Rundall*, 8 T. R. 335, directly affirms the cases of *Grove v. Nevill* and *Johnson v. Pye*. It does not appear, in this case, that there was any misrepresentation by the infant, or that the plaintiff was ignorant of the infancy of the defendant; and the ground upon which it was decided, was, that there were no ingredients of tort in the case. The case was simply this: an infant hired a horse and injured it, and an action was brought *ex delicto*, for the injury, alleging a wrongful and malicious intent. No malice was proved, and the injury was apparently occasioned by the ignorance of the infant. The court said, that the action was clearly founded upon contract, and that it could not be converted into a tort. This is very true, if there were no fraud in the case; and therefore this decision only affirms the doctrine, that where an action is solely founded in contract, without fraud, it cannot be converted into a tort by the pleadings. But the facts did not call for the decision of the question, whether, if there had been positive fraud, it would not have supported an action on the case for tort. See also *Manby v. Scott*, 1 Siderf. R. 109, 129, under Resolution (2),

may be ratified when the infant attains the age of legal maturity.

where the same point seems to have been ruled. In *Fairhurst v. Liverpool Adelphi Association*, 26 Eng. Law and Eq. R. 393, and *Price v. Hewett*, 18 Eng. Law and Eq. 522; the *dictum* of the court is against the liability of the infant. But see *Campbell v. Stokes*, 2 Wend. R. 137, where it was held, that in such a case an infant would be liable in an action of trespass. This case was denied to be law in *Webb v. Welch*, 6 Watts, R. 9, but is cited and approved in *Fitts v. Hall*, 9 N. Hamp. R. 441, and by Chancellor Kent in his Commentaries, 2 Kent's Comm. P. IV. Lec. XXXI. p. 241. note.

It is the clear and established rule in equity, that in cases of fraud, infancy cannot be pleaded in defence. Hence a fraudulent representation or concealment by an infant will bind him. See 1 Story's Eq. Jurisp. § 385, and cases there cited; 1 Foul. Eq. B. 1, ch. 2, § 4; *Savage v. Foster*, 9 Mod. 35; *Bright v. Boyd*, 1 Story, R. 478; *Earl of Buckinghamshire v. Drury*, 2 Eden, 74; *Watts v. Creswell*, 9 Vinor, Abr. 415; *Clare v. Bedford*, 13 Vin. Abr. 536, 537; s. c. cited 2 Vern. 150; *Evroy v. Nicholas*, 2 Eq. Abridg. 448; *Cory v. Gerteken*, 2 Madd. 40; *Clark v. Copley*, 2 Cox, R. 173.

In America there is a strong current of authority in favor of the equity doctrine, that if an infant be guilty of fraud, or fraudulently conceal his age, and thereby obtain money or goods of another, he is liable therefor. In *Vasse v. Smith*, 6 Cranch, 226, it was held by the Supreme Court of the United States, that where an infant possessed goods under a contract of consignment to him to be sold by him at Norfolk, and he wrongfully shipped the same to the West Indies, he was held liable in trover for the conversion. In *Badger v. Phinney*, 15 Mass. 359, the supreme court held, that where goods had been obtained by an infant, upon a false affirmation that he was of age, the vendor might recover them back. So in *Homer v. Thwing*, 3 Pick. R. 492, it was held, that trover lay against an infant who had hired a horse to drive to one place, and drove him to another. But see *contra* *Will v. Welsh*, 6 Watts, R. 9. In *Wallace v. Morse*, 5 Hill, R. 391, it was held, that an infant, who had obtained goods fraudulently, without intending to pay for them, was liable. In *Fitts v. Hall*, 9 New Hamp. R. 441, it was held, that where an infant obtained goods by a fraudulent representation that he was of age, he was liable for such fraud. This case is also upheld by *Towne v. Wiley*, 23 Verm. R. 361. In *Hubbard v. Cummings*, 1 Greenl. 13, the same doctrine was held as in *Badger v. Phinney*. See *Stoolfoos v. Jenkins*, 12 Serg. & Rawle, 399-403. *Green v. Sperry*, 16 Verm. R. 393; *Lewis v. Littlefield*, 15 Maine, R. 236; *Penrose v. Curren*, 3 Rawle, R. 351. *Schenks v. Strong*, 1 South. (N. J.) 87; 10 Am. Jurist, 98; 11 Ibid. 69;

§ 68. No binding ratification of a contract can be made by the infant, until he comes of age, except perhaps in the case of a suit by a minor against an adult, on a contract not executed by the minor, which has been allowed as an exception, — upon the ground, that otherwise there could be no consideration to support the contract.¹

§ 69. There is a distinction between those acts and words, which are necessary to ratify an executory contract, and those

20 Ibid. 264; and the valuable notes to Bingham on Infancy, by Mr. Bennett, p. 111, 113, 114.

The remarks of Mr. Justice Duncan, in *Austin v. Patton*, 11 Serg. & Rawle, are mere *obiter dicta*, not called for in the case. In *Conroe v. Bird-sall*, (1 Johns. Cas. 127,) it was held, that an infant who had given a bond was at liberty to avoid it, if he chose, although it appeared, that there had been a fraudulent misrepresentation by him of his age, in answer to an inquiry by the other party in respect to that point. The court say, however, "We have no doubt of the principle adopted by the judge at the trial, that the disabilities of infants are intended to protect them from injury and imposition, and not to aid them in practices of fraud or collusion; but on consideration, we are of opinion, that its application to the conduct of the defendant in the case before us, so as to charge him with this debt, would tend to endanger all the rights of infants, and ought not to be admitted. The bond in this case must be supported *in toto*, or not at all, and no decision can be found which carries the doctrine of fraud or its effects, in relation to infants at common law, to this extent." The principle here enunciated we heartily acquiesce in, but it is difficult to see why it did not apply to the case, which was one completely within every legal definition of fraud. The consideration did not appear in the report, and there may have been a reason for the decision founded therein. In *Stookfoos v. Jenkins*, (12 Serg. & Rawle, 399,) it is intimated, that in cases of gross fraud by the infant, he could not avoid his contract. In *Word v. Vance*, (1 Nott & McCord, 197,) it was held, that infancy was no defence to an action, *ex delicto*, for a false warranty in the sale of a horse. See, however, *Burley v. Russell*, 10 N. Hamp. R. 184; *Browne v. McCune*, 5 Sandf. R. 225; *Norris v. Vance*, 3 Richardson, R. 161; 1 American Leading Cases, 117: *Stikeman v. Dawson*, 1 De Gex & Smale, 90.

¹ Newland on Cont. 14, *sed quære*; *Zouch v. Parsons*, 3 Burr. 1808; *Forrester's Case*, 1 Sid. 41; *Reeves's Domestic Relations, Parent and Child*, 249, 254.

which are sufficient to ratify an executed contract. In the latter class of cases, any explicit acknowledgment of liability will operate as a ratification. But, in order to ratify an executory agreement made during infancy, there must be not only an acknowledgment of primary liability, but an express promise, voluntarily and deliberately made by the infant upon his arriving at the age of maturity, and with the knowledge, that he is not legally liable.¹ No act or word, therefore, which does not unequivocally imply a new and primary promise by the infant himself, will be sufficient to create a liability on his executory contract.² Thus, where a debt, contracted during infancy, was

¹ *Thompson v. Lay*, 4 Pick. 49; *Hubbard v. Cummings*, 1 Greenl. 11; *Thrupp v. Fielder*, 2 Esp. R. 628; 2 Kent's Comm. 237, and notes; *Whitney v. Dutch*, 14 Mass. 460; *Dilk v. Keighly*, 2 Esp. 481; *Jackson v. Carpenter*, 11 Johns. 537; *Dennison v. Boyd*, 1 Dana, 45; *Harmer v. Killing*, 5 Esp. 102; *Tucker v. Moreland*, 10 Peters, U. S. 73; *Smith v. Mayo*, 9 Mass. R. 62; *Ford v. Phillips*, 1 Pick. R. 202.

² *Mawson v. Blane*, 26 Eng. Law & Eq. R. 560. Parke, B.: "The question in this case was, whether a letter that was written by the defendant, after he came of age on the 22d of February, was a sufficient ratification of a promise made whilst he was an infant, to satisfy the statute of the 9 Geo. 4, c. 14. That depends entirely upon the construction of the letter. [His lordship then stated the facts.] Now, to take the case out of the statute, there must be either a promise by the defendant in writing after he came of full age, or a ratification of the prior contract. The term 'ratification,' has already had an interpretation given to it in *Harris v. Wall*; and there it was held that a ratification means such a ratification as would make a person liable as principal for an act done by a third person in his name. I take the meaning of 'ratification' to be different from a promise. It is an admission that he is liable, and bound to pay that debt on a contract which he made when an infant; therefore, in order to bring the case within Lord Tenterden's Act, there must be an admission in writing, that he was liable to pay on that contract which he made when he was a minor; that is, he was liable to pay, and bound to pay his acceptance, bound to pay *in presenti* the acceptance when due. Now, so understanding the meaning of the term 'ratify,' I was of opinion, at the trial, and I still continue to be of the same opinion, that this letter does not amount to a sufficient acknowledgment of his liability as acceptor of the bill; it is only an assurance. A man might consider himself in honor bound to pay the bill, and it is an assurance that the bill would be paid, not a recognition of being bound to pay by virtue of that bill. The terms of the letter are: 'Your brother tells me;' I will repeat this again: 'Your brother tells me you are

partially paid by the infant after he came of age, it was held not to be a sufficient ratification, although it was an explicit acknowledgment of indebtedment.¹ Indeed, any mere admission of liability is not a sufficient confirmation to sustain an action upon an infant's executory contract; for although it rebuts the presumption of payment created by the statute of limitations, it affords no ground for an action, because the infant may legally refuse to pay a debt, which he acknowledges to be due.² Thus where a defendant, after he became of age, said "he owed the plaintiff, but was unable to pay him, but that he would endeavor to get his brother bound with him," it was held to be no ratification of his contract made during infancy.³ But any direct confirmation and recognition of his promise, although it do not amount to a promise in so many words, will be sufficient to bind the party; as if he should say, "I do ratify and confirm," or do "agree to pay the debt," or "I have not the money now, but when I return from my voyage I will settle."⁴

very uneasy about the £500 bill; pray, make yourself easy about it, as I will take care that it is paid.' Not, 'Make yourself easy about it; you are sure it will be paid, because I am liable as acceptor;' but, 'I will take care that it is paid,' that is, he means to give an assurance that some party will pay it. It is clear who he means to be the party to pay it, certainly the drawer of the bill, and that the means of payment are to come from Sir Henry Pottinger; and he assures the plaintiff that it will be paid, and that Sir Henry Pottinger will come to England in June; he points to him as the source from which payment is to be derived. My opinion was at the trial, and still is, that this is really not any admission that he is liable as principal in virtue of that bill of exchange, that is, as principal, liable to pay the debt. It amounts to nothing more nor less than an assurance, that the plaintiff may be calmed in his feelings on the assurance that this bill will be sure to be paid, and points to the arrival of Sir Henry Pottinger in England, in June. I think the rule ought to be, therefore, discharged."

¹ Thrupp v. Fielder, 2 Esp. 628.

² Lara v. Bird, cited in Peake on Evid. (2d ed.), 260; Whitney v. Dutch, 14 Mass. 460; Jackson v. Mayo, 11 Mass. 147; Martin v. Mayo, 10 Mass. 137; Pierce v. Tobey, 5 Metcalf, R. 188; Ordinary v. Wherry, 1 Bailey, (So. Ca.) R. 28; Wilcox v. Roath, 12 Conn. R. 550.

³ Ford v. Phillips, 1 Pick. 202; Hale v. Gerrish, 8 N. Hamp. R. 374.

⁴ Thompson v. Lay, 4 Pick. 48; Whitney v. Dutch, 14 Mass. 460; Barnaby v. Barnaby, 1 Pick. R. 221; Harris v. Wall, 1 Welsb. Hurl. & Gord. 128.

So, where an infant wrote after coming of age, — “I am sorry to give you so much trouble, but will, without neglect remit to you in a short time,” it was held to be a sufficient ratification of his contract.¹ *A fortiori*, if an infant, who has accepted a bill of exchange, or made a promissory note during his infancy, sign, after his attaining his majority, a written order or authority to his banker or agent, directing a payment thereof, this is a ratification which renders him liable in a suit brought on the note.²

§ 70. The promise, must, however, be made voluntarily and freely, and with a knowledge on the part of the infant, that he is not legally liable upon his contract.³ If, therefore, his promise be obtained by fraud, or duress, or fear, or made in ignorance of his legal rights, it is void.⁴ So, also, the promise must be made to the party in interest, or his agent, and only creates a liability coextensive with its terms.⁵ An exception to this rule is introduced in favor of an agreement by an infant to marry, in which circumstances and conduct, intimating a continuing intention to marry after arriving at legal maturity, are sufficient to raise a new promise.⁶ So, also, the promise must be that the infant himself will pay, and not that some other person will.⁷

§ 71. A ratification may be either absolute or conditional. If it be the latter, the terms of the condition must have hap-

¹ *Hartley v. Wharton*, 11 Adolph. & Ell. 934.

² *Hunt v. Massey*, 5 Barn. & Adolph. 902; s. c. 3 Nev. & Man. 109. .

³ *Hussey v. Jewett*, 9 Mass. 100; *Ford v. Phillips*, 1 Pick. 203; *Harmer v. Killing*, 5 Esp. 102; *Smith v. Mayo*, 9 Mass. 64; *Robbins v. Otis*, 1 Pick. 368; *Millard v. Hewlett*, 19 Wend. R. 301; *Hinely v. Margaritz*, 3 Barr, (Penn.) 428.

⁴ *Brooke v. Gally*, 2 Atk. 34; *Harmer v. Killing*, 5 Esp. 102. See post; *Bigelow v. Grannis*, 2 Hill, R. 120.

⁵ *Goodsell v. Myers*, 3 Wend. R. 479; *Hoit v. Underhill*, 10 N. Hamp. R. 220.

⁶ 2 Stark. Ev. 941; *Hutton v. Mansell*, 3 Salk. 16, 64; s. c. 6 Mod. 172; *Wightman v. Coates*, 15 Mass. 1; *Bobo v. Mansell*, 2 Bailey, 114.

⁷ *Mawson v. Blane*, 26 Eng. Law. Eq. Rep. 560, *supra*.

pened or been complied with, before an action can be sustained.¹ Thus, on a promise to pay a debt, when "he is able," the ability of the party must be proved in order to charge him.² Or if he promise to pay a note upon the happening of a certain event, such event must be proved to have happened, or the party is not liable. Or if a party promise to pay a certain part of a debt, he is only bound to the extent of the new promise.³

§ 72. But if the contract be executed, any slight acknowledgment of liability or admission of the contract is a sufficient ratification; for it is the sound policy of the law to suffer contracts, already completed, to remain undisturbed, whenever they are not founded on fraud or duress, while it shrinks from enforcing the performance of future acts upon executory contracts, made during infancy. When any acknowledgment of liability is made, or can be implied with certainty from the acts or words of the parties, the law considers this a sufficient ratification of that which is completed. Thus, if an infant mortgage his land, and after he comes of age, convey the same land, subject to the mortgage, he thereby confirms the mortgage.⁴ In many cases, mere acquiescence or silence affords a conclusive presumption of ratification, where it is susceptible of such an interpretation.⁵ Thus, where a contract is voidable, and the benefit is a continuing one, the infant will be bound

¹ *Thompson v. Jay*, 4 Pick. 49; *Martin v. Mayo*, 10 Mass. (Rand's Ed.) 141, n. c.; *Robbins v. Otis*, 1 Pick. 370; *Everson v. Carpenter*, 17 Wend. R. 419.

² *Thompson v. Jay*, 4 Pick. R. 49.

³ *Green v. Parker*, cited 1 Esp. Dig. 304, (164); *Peake's Evid.* 260, (2d Ed.); *Bobo v. Hansell*, 2 Bailey, 114. See *Martin v. Mayo*, and note, 10 Mass. R. (Rand's Ed.) 141, n. c.

⁴ *Boston Bank v. Chamberlin*, 15 Mass. R. 220; *Denson v. Boyd*, 1 Dana, R. 45.

⁵ *Brown v. Caldwell*, 10 Serg. & R. 114; *Holmes v. Blogg*, 8 Taunt. 35; s. c. 1 Moore, 466; *Goode v. Harrison*, 5 B. & Ald. 147; *Lawson v. Lovejoy*, 8 Greenl. 405.

by it, unless he expressly disaffirm it upon coming of age.¹ So, if, after coming of age, he accept rent upon a lease made during his infancy, it is a ratification of the lease, and he cannot avoid it.² So, if he make a lease for a term extending beyond the time of his infancy, and after coming of age he make no objection, and do no act contradicting such a presumption, his acquiescence will be treated as a ratification.³ So, if, after coming of age, he retain, without objection, premises leased to him, he will be understood to affirm the lease.⁴ So, if he retain possession of land conveyed to him during his minority,⁵ or convey it to a third person, or continue to act, as if the land were his own property, it will be a ratification of the conveyance.⁶ So, also, if during his infancy he profess to be a partner in a particular firm, he will be liable on contracts made with the firm, after he has arrived at maturity, unless he expressly deny and disaffirm the partnership at that time.⁷ So, also, where an infant has made purchases, if, after coming of age, he treat the property purchased as his own, when it is in a condition to be restored, and is of value, — either by merely retaining it without notice to the seller of his readiness to restore it, and *a fortiori* by selling or otherwise disposing of it, or declining to return it after demand by the seller, a ratifica-

¹ Richardson v. Bright, 9 Verm. R. 368.

² Ashfield v. Ashfield, W. Jones, 157, affirmed in the Exchequer Chamber by all the judges; s. c. Latch, 199; Godb. 364; Story v. Johnson, 2 Younge & Coll. 586; Barnaby v. Barnaby, 1 Pick. R. 224.

³ Smith v. Low, 1 Atk. 489; 2 Southard, 460.

⁴ Ketsey's case, Cro. Jac. 320; Kirton v. Elliott, 2 Bulst. R. 69; 1 Roll. Abr. Enfants (k), 731; (e), 45; Evelyn v. Chichester, 3 Burr. R. 1719; Baylis v. Dinely, 2 Maule & Selw. 481; Holmes v. Blogg, 8 Taunt. R. 35, 37.

⁵ Cheshire v. Barrett, 4 McCord, 241; Dana v. Coombs, 6 Greenl. 89; Lynde v. Budd, 2 Paige, 191; Hubbard v. Cummings, 1 Greenl. 11; 20 Am. Jur. 273, and cases cited.

⁶ Hubbard v. Cummings, 1 Greenl. 11.

⁷ Goode v. Harrison, 5 B. & Ald. 147; Miller v. Sims, 2 Hill, S. L. R. 479. See, on the other hand, Dana v. Stearns, 3 Cush. R. 372.

tion will be implied.¹ Indeed, wherever he continues, after coming of full age, to occupy a position, which is only explicable upon the supposition that he intends to stand by his contract, it will be considered as a ratification of an executed contract. He is, however, allowed a reasonable time after he comes of age, *locus pœnitentiæ*, during which he may disaffirm his contract, and during which, a mere acquiescence, without any unequivocal acts, establishing a clear intention to confirm his contract, will not operate as a confirmation.²

§ 72 *a*. The late English cases seem to assert the doctrine that the infant is bound expressly to disaffirm his contract within a reasonable time after coming of age, and that if he neglect to do so, his silence will operate as an affirmation of his contract.³ The same doctrine is also asserted in several cases in this country,⁴ but the better opinion would seem to be that mere silence, for a reasonable time, would only operate as a ratification of a contract, where, from the circumstances of the case, it raises an implied promise to abide by it; as where it was the duty of the infant to disaffirm, or where he exercises rights of ownership of articles sold to him, inconsistent with any other view than that he intends to keep them and pay for them, — or where he resells them.⁵

¹ *Boyden v. Boyden*, 9 Metcalf, R. 519; *Boody v. McKenney*, 10 Shep. R. 517; *Aldrich v. Grimes*, 10 N. Hamp. R. 194.

² *Tucker v. Moreland*, 10 Peters, 75, 76; *Jackson v. Carpenter*, 11 Johns. 542; *Holmes v. Blogg*, 2 Moore, 552; s. c. 1 Moore, 466.

³ *Dublin and Wicklow Railway Co. v. Black*, 16 Eng. Law & Eq. R. 556–558; *North-Western Railway v. McMichael*, 5 Excheq. R. 114–121; *Leeds and Thirsk Railway v. Fearnley*, 4 Excheq. R. 26; *Cork, &c., Railway Co. v. Cazenove*, 10 Q. B. R. 935; *The Midland and Great Western Railway Co. v. Quin*, Q. B. of Ireland, May 11, 1851.

⁴ *Holmes v. Blogg*, 8 Taunt. R. 39, by Dallas, J.; *Richardson v. Bright*, 9 Verm. 368; *Kliver v. Beebe*, 6 Conn. R. 506; *Scott v. Buchanan*, 11 Humph. 474.

⁵ In an admirable note to *Dublin & Wicklow Railway Co. v. Black*, 16 Eng. Law & Eq. R. 558, the editor (Mr. Bennett) says, "It may be doubted

§ 72 *b*. A ratification has a double effect; it both affirms the

whether the current of authorities in America, at the present time, will warrant the abstract position, that a bare neglect to *disaffirm*, is *itself* a ratification, unless accompanied with some positive acts indicative of an intention to abide by the contract. Silence for an unreasonable time, taken in connection with other facts, such as using the property purchased, retaining possession of it, selling or mortgaging it, or in any way converting it to the infant purchaser's own use, would undoubtedly be a sufficient ratification. The American decisions are numerous and clear upon this point. Thus, in *Lawson v. Lovejoy*, 8 Greenleaf, R. (Bennett's Ed.), 105, a minor bought a yoke of oxen for which he gave his note; after arriving at full age he 'converted the oxen to his own use, and received the avails.' This was held a binding ratification, and the infant was adjudged liable on his note.

"So in *Boyden v. Boyden*, 9 Metcalf, 519, (1845,) a minor having given his note for a horse and plough, kept the horse a year after attaining full age, and then *sold* him. The plough he kept and used two or three years, without giving any notice of a desire to disaffirm the contract. The jury were told this operated as a ratification.

"In like manner in *Cheshire v. Barrett*, 4 McCord, 241, (1827,) an infant having given his note for a horse, which he sold after arriving at full age, was held thereby to have ratified the contract. *Deacon v. Boyd*, 1 Dana, 45, (1833,) is precisely similar. See also *Alexander v. Heriot*, 1 Bailey, Eq. R. 223; *Boody v. McKenney*, 23 Maine, 517, (1844,) is one of the most recent cases to the same point. The case of *Delano v. Blake*, 11 Wendell, 85, (1833,) is one of the strongest American cases, in support of the position that the infant must positively disaffirm, within a reasonable time, or he will be bound. There an infant received the note of a third person, not the debtor, in payment for work and labor. This note he kept for *eight months*, after the arrival at maturity, when the maker becoming insolvent, the infant tendered the note to the original debtor, and sued him on account for his services. It was held that simply retaining the note so long a time, was, under all the circumstances, a ratification. See also *Thomasson v. Boyd*, 13 Alabama, 419, (1848).

"In *Aldrich v. Grimes*, an infant purchased property, with a privilege of return, if it did not answer. After he became of age, the vendor requested him to return it, if he did not intend to keep it. The infant said 'he could not return it then, and did not know as he should; he did not know but he should keep it.' He did keep and use it for two or three months, when he offered to return it, but the adult declined to receive it, and sued him for the price. The infant was held liable on his note for the price.

"All these cases proceed upon the ground of *intention*. There must exist an intention to abide by the contract; and a close examination of those cases

original contract, and creates a new one; so that the party to

where the infant has been held *not* to have ratified the purchase, will show that a mere neglect to give notice that he repudiates the contract, has not been considered *per se*, a ratification. Thus, in *Smith v. Kelley*, 13 Metcalf, 309, an infant bought goods, and three days before he came of age the sellers attached them on a writ against him, for their price. The officer took the goods into his own custody, and held them under the attachment until the time of trial. The infant, however, never gave any notice of his intention to repudiate the contract, but it was held that there was not here sufficient evidence of a ratification, the defendant not having the actual possession and custody of the goods, he was not bound to disaffirm the purchase.

"So in *Thing v. Libbey*, 16 Maine, 55, (1839,) an infant having purchased property, assigned it during his minority *bonâ fide* to secure a debt due a third person. The infant remained in possession of the goods, some time after he became of age, but as agent for the assignee. He never gave any notice of an intention to disaffirm the contract, but being sued for the goods, was held not to have ratified the purchase.

"The case of *Dana v. Stearns*, 3 Cushing, 372, (1849,) bears also upon this point. There, B., a minor, and S., a person of full age, entered into a partnership, to the capital stock of which B. contributed about \$900, and which was dissolved by mutual consent, before B. came of age. On the dissolution, it was ascertained that the firm had made about \$300, and B. sold and conveyed to S. all his interest in the partnership property, for which he received the note of S. for \$1,100, secured by a mortgage of personal property, and S. at the same time gave B. an obligation to pay the debts of the firm. After coming of age, B. proved his note against the estate of S. who had taken the benefit of the insolvent law, and also instituted proceedings with a view to enforce his claim under the mortgage. It was held, that by these proceedings B. had not ratified the partnership, and had not made himself liable for the partnership debts.

"The true rule on this subject seems to have been laid down in *Hall v. Gerrish*, 8 New Hampshire, R. 374, (1836,) that the acts relied upon to constitute a ratification, must be of a character to constitute as perfect evidence of a ratification as would an express and unequivocal promise to pay. In that case, the infant not only did not disaffirm after arriving at full age, but when called upon to pay, said he owed the debt, and that the plaintiff would get his pay, but refused to give his note, as he would be liable to be arrested. This was considered no ratification.

"So in *Ford v. Phillips*, 1 Pickering, 202, (1822,) the infant not only did not give any notice of a disaffirmance, but said, after his majority, that he owed the plaintiff, and would try to get his brother to be bound for it. The contract was held not to be ratified. *Goodsell v. Myers*, 3 Wendell, 479,

whom the infant is liable may sue upon either.¹ But where an action is brought upon the contract of an infant, a ratification or promise, made subsequent to the commencement of the suit, though after his coming of age, will not sustain it.²

§ 73. We shall now consider those contracts which are binding upon the infant, *ab initio*, and need no ratification. 1st. Where an infant is authorized, by statute, to make a contract for the public service, as to enlist in the army or navy, such

(1830,) is to the same effect. There an infant purchased a horse during minority, and gave his note. A year after he became of age he said to a third person, he owed the debt and was going to pay it. He never gave any notice of an intention to disaffirm. Held, he was not bound. *Thompson v. Lay*, 4 Pickering, 48, (1826,) is clear to the point of the necessity of an express ratification. *Hoit v. Underhill*, 9 New Hampshire, 436; *Wilcox v. Roath*, 12 Connecticut, 550; *Smith v. Mayo*, 9 Massachusetts, 62, and many other authorities to the same effect exist. *Benham v. Bishop*, 9 Connecticut, 330, (1832,) bears strongly upon this point. There, an infant purchased real estate during infancy, for which he gave his note. He remained in possession some time after he became of age, and then submitted the question to arbitration, whether he was bound to pay the note. Neither of these facts was considered a ratification, although the infant gave no notice of repudiation. Daggett, J., pertinently said, in giving judgment, 'An infant buys a horse, carriage, or land, gives his promissory note for the price, and, upon coming of full age, does not return the property, nor offer to return it. To a suit on the note, he pleads infancy, and a new promise is replied;—will that evidence support the issue?'

"The fact that part payment even of a debt contracted during infancy will not be a ratification, as has been often held, (*Thrupp v. Fielder*, 2 Esp. R. 628; *Hinely v. Margaritz*, 3 Barr, 428; *Robbins v. Eaton*, 10 New Hampshire, 561,) would seem to show conclusively that *à fortiori*, a bare non-disaffirmance would not have any such effect.

"On the review of the authorities it would seem that the *dictum* of Dallas, J., above cited, is not sustained, either upon principle or authority, and that some act is necessary, on any infant's part, tending to show an intention to ratify, or he will not be bound."

¹ *Gibbs v. Merrill*, 3 Taunt. R. 307; *Hunt v. Massey*, 5 Barn. & Adolph. 902; *Hartley v. Wharton*, 11 Adolph. & Ell. 934; *Cohen v. Armstrong*, 1 Maule & Selw. 724.

² *Thing v. Libbey*, 4 Shep. R. 55; *Goodrich v. Ross*, 6 Metcalf, R. 487.

contract is deemed to be for his benefit, and is neither void nor voidable.¹

§ 73 *a.* 2d. All acts which he is under a legal obligation to do, are binding upon him;² as a bond for the support of his illegitimate child where the statute obliges him to support his illegitimate child, and makes it necessary for him to give such bond.³ So, also, as he is bound, by law, to provide for the support of his wife and children, he is answerable for necessities furnished to them.⁴

§ 74. 3d. An infant may bind himself as an *apprentice* to a trade,⁵ and if he made a party to the indenture, or if his consent be expressed in it, he cannot dissolve the relation.⁶ But he may set up his infancy as a defence for violation of his covenants, by the common law,⁷ although he cannot abandon his master's service, and avoid his indenture,⁸ unless his master desert him.⁹

¹ U. S. *v.* Bainbridge, 1 Mason, 71; Commonwealth *v.* Harrison, 11 Mass. 65; U. S. *v.* Anderson, Cooke, 143; Commonwealth *v.* Murray, 4 Binn. 487.

² The People *v.* Moores, 4 Denio, R. 519; Baker *v.* Lovett, 6 Mass. R. 80. See also U. S. *v.* Bainbridge, 1 Mason, R. 83; The People *v.* Mullin, 25 Wend. R. 698; Winslow *v.* Anderson, 4 Mass. R. 376; Elliott *v.* Horn, 10 Ala. R. 348.

³ The People *v.* Moores, 4 Denio, R. 519.

⁴ Turner *v.* Trisby, 1 Strange, R. 168; Bull. N. P. 155.

⁵ Rex *v.* Arundel, 5 Maule & Selw. 257; Woodruff *v.* Logan, 1 Eng. Law, 276.

⁶ 2 Kent, Comm. P. IV. Lec. xxi. p. 242; Wood *v.* Fenwick, 10 Mees. & Welsb. 195; The King *v.* The Inhabitants of Wigston, 3 Barn. & Cres. 484.

⁷ Whittingham *v.* Hill, Cro. Jac. 494; Gylbert *v.* Fletcher, Cro. Car. 179; Jennings *v.* Pitman, Hutton, 63; Lyllly's case, 7 Mod. 15; Whitley *v.* Loftus, 8 Mod. 190; Blunt *v.* Melcher, 2 Mass. 228; McDowle's case, 8 Johns. 331; Harper *v.* Gilbert, 5 Cush. R. 417; Balch *v.* Smith, 12 N. Hamp. R. 428; Harvey *v.* Owen, 4 Blackf. R. (Ind.) 338. See also Mr. Bennett's note to Bing. on Infancy, 90. By the custom of London, infancy is no defence.

⁸ The King *v.* Inhabitants of Great Wigston, 5 Dowl. & Ryl. 339; s. c. 3 Barn. & Cres. 484.

⁹ King *v.* Mountsorrel, 3 Maule & Selw. 497.

§ 74 *a*. A contract for labor and service is, however, voidable by an infant;¹ and even although it be an entire contract, he may recover a *quantum meruit* for the labor actually performed, deducting any damage which may have accrued to his employer in consequence of the imperfect performance.² His action should, however, be brought in the name of his parents or guardian. Payment of wages to the son is ordinarily no defence to an action by the father, because to the father alone are his wages due.³ Yet if the son be emancipated and allowed to work on his own account, he alone is entitled to his earnings, and they cannot be attached by his father's creditors.⁴ The father's consent that the child shall have his own earnings will be implied from a knowledge that he is working for himself, if no objection be made by his father.⁵ So, also, when a father leaves a son in charge of a mother, whom he has deserted, he cannot claim the child's

¹ Nickerson *v.* Eastern, 12 Pick. R. 112; Vent *v.* Osgood, 19 Pick. R. 572; Francis *v.* Felmet, 4 Dev. & Bat. (N. Car.) 498; Medbury *v.* Watsons, 7 Hill, R. 110. See also Bing. on Infancy, and Mr. Bennett's note, p. 89, 90; Peters *v.* Lord, 18 Conn. R. 337.

² Moses *v.* Stevens, 2 Pick. R. 332; Thomas *v.* Dike, 11 Verm. R. 273; Vent *v.* Osgood, 19 Pick. R. 572; Hoxie *v.* Lincoln, 25 Verm. R. 217; Judkins *v.* Walker, 17 Maine, R. 38; Medbury *v.* Watsons, 7 Hill, R. 110; Moulton *v.* Trask, 9 Metcalf, R. 577; Corpe *v.* Overton, 10 Bing. R. 252. But see Whitmarsh *v.* Hall, 3 Denio, R. 375, *contra* as to allowing any deductions.

³ Shute *v.* Dorr, 5 Wend. R. 204; Clapp *v.* Green, 10 Met. 409; Galbraith *v.* Black, 4 Serg. & Rawle, 207; White *v.* Henry, 24 Maine, R. 531; Keen *v.* Sprague, 3 Greenl. R. 77.

⁴ Morse *v.* Welton, 6 Conn. R. 547; Jenney *v.* Alden, 12 Mass. R. 375; Tillottson *v.* McCrillis, 11 Verm. R. 477; Lord *v.* Poor, 24 Maine R. 569; U. S. *v.* Mertz, 2 Watts, (Penn.) 406; Burlingame *v.* Burlingame, 7 Cowen, R. 92.

⁵ Whitney *v.* Earle, 3 Pick. R. 201; Corey *v.* Corey, 19 Pick. R. 29; Canover *v.* Cooper, 3 Barb. R. 15; Cloud *v.* Hamilton, 11 Humph. R. 104; Clinton *v.* York, 26 Maine R. 167; Armstrong *v.* McDonald, 10 Barb. R. 300; Taunton *v.* Plymouth, 15 Mass. R. 203; Perlman *v.* Phelps, 25 Verm. R. 478. But see Stiles *v.* Granville, 6 Cush. R. 458.

earnings.¹ Nor can he claim his earnings where the father is a pauper and insane, since he is under no obligation to support his child in such case.² Emancipation by the father must be proved, and will not be presumed.³ Desertion by the child with vagrancy and crime does not of itself constitute emancipation.⁴

§ 75. 3d. *Executed contracts of marriage* are binding upon an infant. By the common law, the age of consent, at which the contract of marriage may be made, is fourteen years in a male, and twelve in a female, and a marriage entered into after that age, and before majority, is valid, and cannot be avoided.⁵ But if the contract be entered into before such age, which is called the age of discretion, it is voidable at the mere will of either party, without legal process; or if one party only be under the age of discretion, it is at the option of either to affirm it or not. This is an anomaly in the law relating to promises. If, however, an infant be married, and affirm such contract after arriving at maturity, no subsequent marriage ceremony is necessary. Such affirmance may be either express or implied, if the parties still continue to live together, between an infant and adult. It comes, however, within the general principles of contract, which require a reciprocal assent of the parties, and is allowed in these particular cases, upon the ground stated by Lord Coke, that "in contracts of matrimony, either both must be bound, or equal election of disagreement be given to both."⁶

¹ Wodell v. Coggeshall, 2 Metc. R. 89; The Etna, Ware, R. 462; Chilson v. Phillips, 1 Verm. R. 1.

² Tenness v. Emerson, 15 N. Hamp. R. 486.

³ Sumner v. Sebec, 3 Greenl. R. 223; White v. Henry, 21 Maine, R. 531.

⁴ Bangor v. Readfield, 32 Maine, R. 60.

⁵ Such is still the law in Massachusetts, although the person marrying a minor of that age is liable to a statute penalty. Parton v. Harvey, 1 Gray, R. 119.

⁶ Co. Litt. 79 b, and notes 49 and 45; 1 Roll. Abr. 341; Bac. Abr. Infancy and Age, A.; 1 Black. Comm. 462.

§ 76. 4th. The *representative acts* of an infant are binding, generally; as where he is an executor or trustee;¹ upon the plain ground, that such contracts do not concern his own interest, and to render them void, would be to invalidate the contract of the *cestui que trust*, who may be perfectly competent to contract, and who has an undoubted right, if he choose, to take the risk of the infant's competency.

§ 77. 5th. Contracts for "*necessaries*" are binding upon an infant. The ground, upon which the contracts of infants for necessaries are enforced, has been said to be, not because they are contracts, but only "since an infant must live as well as a man," the law gives a reasonable price to those, who furnish him with necessaries.² This class includes by far the greatest number of cases in which an infant is liable on his contract. The legal term "*necessaries*," is a relative term, not strictly limited to such things as are absolutely requisite for support and subsistence, but to be construed liberally and varying with the estate and degree, the rank, fortune, and age of the infant.³ His real and not his ostensible fortune and circumstances, however, constitute the test and criterion, as to whether the articles are necessaries or not.⁴ What would be necessary

¹ The King v. Inhabitants of Great Wigston, 5 Dowl. & Ryl. 339; s. c. 3 Barn. & Cres. 484.

² Bacon, Abr. Infancy, I. 1.

³ Bac. Abr. Infancy, I. 1; Comyn's Dig. Infant, B. 5; Rainsford v. Fenwick, Carter, R. 215; Hands v. Slaney, 8 T. R. 578; Harrison v. Fane, 1 Scott, N. R. 287.

⁴ Story v. Perry, 4 Carr. & P. 526; Cook v. Deaton, 3 Car. & P. 114; Burghart v. Angerstein, 6 Car. & P. 699; Ford v. Fothergill, 1 Esp. 211. In Story v. Perry, 4 Car. & Payne, 526, which was a case where clothes were furnished by a tailor to the defendant, a minor, the charges for which were proved to be reasonable, Lord Tenterden said: "The question, if there be any in this case, is, whether these things were necessaries, suited to the defendant's station and rank in society. It is the duty of all to enforce that wholesome provision, which protects infants from their own improvidence; and that cannot be better done than by preventing others from encouraging them in that improvidence. If a tradesman trusts an infant, he does it at his

to one person in one situation in life, would by no means be so in another and different one; and what is suitable is therefore considered as necessary.¹ Thus, a servant's livery was considered a necessary in one case, for which the defendant, his master, was liable; and horses, and jewelry, and lodgings have been held to be necessities under certain circumstances.² But articles which are purely ornamental and not useful, are not necessities,³ and Vaughan, C. J., held, that "balls and serenades at night must not be accounted necessities," even for a nobleman.⁴

§ 77 *a*. Again, in order to bring any articles furnished to an infant within the class of necessities, it must appear that they were to supply *personal* wants, either of the body, as food, clothing, lodging, medicines, and the like, — or of the mind, as in the case of schooling and instruction;⁵ and what would be proper expense for instruction would depend on the station and condition of the infant.⁶ This rule is extended so as to

peril, and he cannot recover, if it turn out that the party has been properly supplied by his friends."

¹ Brooks *v.* Crowse, Andr. 277; Clowes *v.* Brooke, 2 Strange, 1101; Barber *v.* Vincent, 1 Freeman, 531.

² Hands *v.* Slaney, 8 T. R. 578; Harrison *v.* Fane, 1 Scott, N. R. 287; Peters *v.* Fleming, 6 Mees. & Welsb. 42; Crisp *v.* Churchill, cited in Lloyd *v.* Johnson, 1 Bos. & Pul. 361. But see Rainwater *v.* Durham, 2 Nott & McCord, 524.

³ Peters *v.* Fleming, 6 Mees. & Welsb. 42; Brooker *v.* Scott, 11 Mees. & Welsb. 67; Chapple *v.* Cooper, 13 Mees. & Welsb. 252.

⁴ Rainsford *v.* Fenwick, Carter, 216, *sed quere*.

⁵ Tupper *v.* Cadwell, 12 Metcalf, R. 562, per Mr. Justice Dewey; Co. Litt. 72; 2 Roll. R. 271; Chapple *v.* Cooper, 13 Mees. & Welsb. 252.

⁶ Peters *v.* Fleming, 6 Mees. & Welsb. 48. A good common school education would in all cases be considered as necessary. Manby *v.* Scott, 1 Siderfin, 112; Middlebury Coll. *v.* Chandler, 16 Verm. R. 683; Raymond *v.* Loyl, 10 Barb. S. C. R. 489. But in this country a regular collegiate education has been held not to be within the class of necessities for a person of ordinary rank and circumstances in life. Middlebury Coll. *v.* Chandler, 16 Verm. R. 683.

include the wife and children of the infant, and he will be responsible for necessities furnished to them in like manner as he would if furnished to himself.¹ Yet for necessities furnished to a person he is to marry, and in view of that marriage, he is not liable.²

§ 77 *b*. Whether the articles furnished are actually necessary to the particular infant, is a question of fact for a jury; but whether they come within the class of necessities suitable to persons in his condition, is a question of law.³ That is, whenever the articles supplied are of a doubtful character, and may or may not have been necessary for the particular infant, it is for the jury to determine, under the direction of the court, as to what the legal term necessities imports, whether the articles in question were necessities in the particular case. But if the articles be manifestly not necessities, but mere luxuries or conveniences, the court will adjudge the question as matter of law, without putting it to the jury; and though the articles may under certain circumstances be considered as necessities, yet if no special circumstances be shown, making them so, and they are *primâ facie* not within the class, the court will adjudge the question as matter of law.⁴ Thus, where fruit,

¹ *Turner v. Trisley*, 1 Strange, R. 168; *Bacon, Max.* 67; *Rainsford v. Fenwick*, 1 Carter, R. 215; *Beeler v. Young*, 1 Bibb, R. 519.

² *Ibid.* *Beeler v. Young*, 1 Bibb, R. 519; *Abell v. Warren*, 4 Verm. R. 149.

³ *Beeler v. Young*, 1 Bibb, 519; *Stanton v. Wilson*, 3 Day, 37; *Maddox v. Miller*, 1 Maule & Selw. 738; *Bacon, Abr. Infancy and Age*, I. 1; *Lowe v. Griffith*, 1 Scott, 458; *Phelps v. Worcester*, 11 N. Hamp. R. 51; *Grace v. Hale*, 2 Humphreys, R. 27; *Tupper v. Cadwell*, 12 Metcalf, R. 559; *Mason v. Wright*, 13 Metcalf, R. 306.

⁴ Such at least seems to be the current of opinion in the recent cases. In *Peters v. Fleming*, 6 Mees. & Welsb. 42, the plaintiff, who was a jeweller, brought an action against an infant for the price of four rings, a gold watch-chain, and a pair of breastpins; infancy was pleaded in defence, and the plaintiff replied that the articles were *necessaries* suitable to the estate, degree, and condition of the defendant. It appeared that the infant was the eldest son of a gentleman of fortune, who was a member of Parliament, and that he was an undergraduate at the University of Cambridge, and resided at

confectionary, &c., were supplied to a student at Oxford for dinners at his rooms, where he received parties of friends, it

the University. The jury found that the articles were necessities, and a motion was made to set aside the verdict as contrary to evidence. The Court of Exchequer, however, refused to interfere, and Baron Parke said, "It is perfectly clear, that from the earliest time down to the present, the word *necessaries* was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense, but with the qualification above pointed out. Then the question in this case is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, namely, the breastpin and the watch-chain. The former might be a matter either of necessity or of ornament: the usefulness of the other might depend on this, whether the watch was necessary; if it was, then the chain might become necessary itself. Now it is impossible for us to say that a judge could withdraw it from the consideration of the jury, whether a watch was not a necessary thing for a young man at college, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the chain is concerned, a question for the jury; there was, therefore, evidence to go to the jury. The true rule I take to be this,—that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible." But in *Harrison v. Fane*, 1 Man. & Grang. 550, the action was brought against an infant by a livery-stable keeper for the hire of horses, and it appeared that the defendant was the younger son of a gentleman who had once been a member of parliament, and that the defendant had a horse of his own, and sometimes hunted with his father's hounds. Under these circumstances, the judge charged the jury that the horses were not necessities, but the jury found a verdict for the plaintiff, and the court set it aside as perverse and contrary to law. Tindal, C. J. said, "I do not say that horses and gigs are not necessities under any circumstances; but no evidence was given that they were so in the present case. All that was shown was that defendant kept a horse, and sometimes hunted with his father." Maule, J., said, "The plaintiff altogether failed in making out that the horses which he had let to defendant were necessities. I doubt whether the jury thought they were so; they were probably of opinion that an improper defence had been set up." In *Brooker v. Scott*, 11 Mees. & Welsb. 67, dinners, confectionary, soda-water, lozenges, oranges, jellies, and other articles of a similar kind were furnished to an infant, for the price of which an action was brought, and the jury having given a verdict for the plaintiff, a rule *nisi* was obtained, and the

was held, that so far as the articles were furnished for entertainments given by the defendant to his friends, the question was

court held, that the articles were *primâ facie* not necessities, and as no circumstances were alleged to make them so, the plaintiff should be nonsuited. The counsel having cited the remarks of Baron Parke (*supra*) in *Peters v. Fleming*, that "the word necessities was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is," Baron Alderson said, "That is to be understood with this qualification, which is pointed out in the same judgment, that the articles be *useful*. If they are useful, whether they be necessities will depend on the condition and quality of the individual. But there are articles merely useless and luxurious." To the objection that the articles might have been necessities, Baron Parke said, "If there be special circumstances you ought to show them," and Lord Abinger said, "The question is, whether on the face of this bill we see any articles that we think should have been considered by the jury under all the circumstances of the case as necessities, and we think there are none." See *Wharton v. Mackenzie*, and *Cripps v. Mills*, 5 Adolph. & Ell. N. S. 606; S. C. 48 Eng. Common Law Rep. This was an action for fruit, confectionary, marmalade, ices, soda-water, and other articles sold and delivered to an infant,—and it appeared that these articles were furnished for dinners given by the infant, who was an Oxford undergraduate, at his own rooms. The judge directed the jury, "that in considering what articles should be considered necessary, they were to take into their estimation the rank and fortune of the defendant, and to determine whether the supply was extravagant." A rule *nisi* having been obtained for misdirection, the case was re-argued. Mr. Justice Coleridge said, "It is a most important inquiry, how far the question is for the court, and how far for the jury. In some cases, the question must be for the judge. Suppose the son of the richest man in the kingdom to have been supplied with diamonds and race-horses, the judge ought to tell the jury that such articles cannot possibly be necessities. In *Wharton v. Mackenzie*, the fact of the defendant's illness was proved in order to explain the supply of some of the articles. In such a case, the question is a mixed one of law and fact, and must go, with proper directions, to the jury. Without any explanation, the court will decide the question. As to what is the meaning of the word 'necessaries,' we have my brother Parke's admirable judgment; to which I will make only one addition, suggested by the argument urged at the bar. It is said that we are to look at the circumstances of each defendant. True, we must do so. But the articles supplied must be necessities, and not merely comforts or conveniences. Then we shall arrive at the principle acted on in *Brooker v. Scott*, 11 Mees. & Welsb. 67, where the court

properly one of law, it being manifest that such articles could in no sense be necessary to him.¹ It seems, also, that it is incumbent on the plaintiff to prove affirmatively, that the articles sold were necessary, and if he give no such proof, the verdict must be for the defendant.²

§ 78. But if articles, however necessary in kind, be furnished to an infant, who is already supplied by his friends; or if things be furnished of too expensive a nature, or unsuitable to the infant's condition, no action can be maintained for their price. In order to charge the infant for necessities, it is not only necessary to prove, that they were suitable in *quality*, but also that they were suitable in *quantity*.³ Thus, if a minor have been already supplied with ten coats by one tradesman, when the plaintiff supplies him with another, he cannot recover the price thereof, on the ground that it was necessary.⁴ It is in-

decided that it could not be necessary for an undergraduate to have dinners at his own lodgings, unless under circumstances furnishing an explanation. It cannot otherwise be necessary, though possibly convenient or proper. This rule imposes no hardship on tradesmen. If they do not intend to pander to extravagance, let them not give credit. In one of these cases, the bill was allowed to run on for two years and a half. That could have been done, only, lest, if the bill were sent in earlier, the supply of such articles might be stopped. Tradesmen must understand that, if they choose so to act, they are trusting only to what they call the honor of the parties supplied."

¹ Wharton v. Mackenzie, 5 Adolph. & Ell. 611; Cripps v. Hill, Ibid.; Brooker v. Scott, 11 Mees. & Welsb. 67; Harrison v. Fane, 1 Scott, N. R. 287; Stanton v. Wilson, 3 Day, R. 37; Rainwater v. Durham, 2 Nott & McCord, 524; Bent v. Manning, 10 Verm. R. 225; Randle v. Keeler, 7 Watts, R. 239; Phelps v. Worcester, 11 N. Hamp. R. 51; Grace v. Hale, 2 Humph. R. 27.

² Harrison v. Fane, 1 Scott, N. R. 287; Glover v. Ott, 1 McCord, 572.

³ Burghart v. Angerstein, 6 Car. & Payne, 690; Johnson v. Lines, 6 Watts & Serg. 80, and cases cited above.

⁴ Story v. Perry, 4 Car. & Payne, 526; Burghart v. Angerstein, 6 Car. & Payne, 690. In Cook v. Deaton, 3 Car. & Payne, 114, which was a suit by a tailor against a minor, Best, C. J., said, "the plaintiff ought to have made inquiries of the father. The father says he knew nothing about the plaintiff's

cumbent on the tradesman to satisfy himself, by due inquiry, that the articles which he furnishes are actually suitable, both in quality and quantity, and his ignorance or carelessness will be no ground of recovery in an action upon the contract.¹ But while an infant remains under the care of his father or guardian, and is supported by him, he is not liable, even for necessities, upon the ground, that otherwise the father would be deprived of the right of exercising his discretion, as to the manner and degree of his support.²

§ 79. It has always been held that an infant is bound to pay a reasonable price for such necessary things as relate to his maintenance and education — as for food, lodging, apparel, medical attendance, and schooling,³ — unless credit be given solely to the parent, which is presumed to be the fact, if it appear that the infant was placed at school, or is supported by him.⁴ But an infant can only be charged upon contracts relating to his personal wants, of body or mind, and he will not be liable for expenditures or services in respect to his personal or real estate, nor for goods and wares supplied to him to furnish his shop, or to enable him to carry on his trade,

supplying his son with clothes; as there were proper clothes provided by the father, those furnished by the plaintiff cannot be considered as necessities."

¹ *Charters v. Baynton*, 7 Car. & Payne, 52, 55; *Burghart v. Angerstein*, 6 Car. & Payne, 690; *Bainbridge v. Pickering*, 2 Bl. R. 1325; *Ford v. Fothergill*, Peake, R. 229; s. c. 1 Esp. 211; *Mortara v. Hall*, 6 Simons, 465; *Guthrie v. Murphy*, 4 Watts, 80; *Kline v. L'Amoureux*, 2 Paige, 419.

² *Angel v. McLellan*, 16 Mass. 31; *Wailing v. Toll*, 9 Johns. 141; *Hall v. Conolly*, 3 McCord, 6; *Kline v. L'Amoureux*, 2 Paige, 419; *Guthrie v. Murphy*, 4 Watts, 80; *Bainbridge v. Pickering*, 2 W. Bl. R. 1325; *Wailing v. Toll*, 9 Johns. 141.

³ *Manby v. Scott*, 1 Sid. R. 112; *Baker v. Lovett*, 6 Mass. R. 78; *Stone v. Dennison*, 13 Pick. R. 1; *Deane v. Annis*, 2 Shep. R. 26; Ante, § 77 a.; *Tupper v. Cadwell*, 12 Metcalf, R. 563.

⁴ *Crantz v. Gill*, 2 Esp. 472; *Duncombe v. Tickridge*, Aleyn, 94; *Bacon*, Abr. Infancy and Age, I. 1; *Angel v. McLellan*, 16 Mass. 28; *Wailing v. Toll*, 9 Johns. 141; *Sims v. Norris*, 5 Ala. R. 42; *Phelps v. Worcester*, 7 N. Hamp. R. 57; *Baker v. Lovett*, 6 Mass. 78; *Stone v. Dennison*, 13 Pick. 1.

even although he obtain his subsistence thereupon;¹ for it is not sufficient in such cases to show that the contract was beneficial to him in a pecuniary point of view, — it must also be for necessities.² Yet if any articles supplied to him for the carrying on of his trade, or other purpose, be consumed by him as necessities, he would be liable therefor, in an action of assumpsit.³ So, also, he is not liable for money borrowed by him to lay out in necessities, and therefore the lender must, at his peril, lay it out for him, or see that it is so laid out by him.⁴ For it is clearly established, that even if the infant do appro-

¹ *Whittingham v. Hill*, Cro. Jac. 494; *Latt v. Booth*, 3 Car. & Kir. 292; *Rundell v. Keeler*, 7 Watts, R. 207; *Whywall v. Champion*, 2 Str. R. 1083; *Tupper v. Cadwell*, 12 Metcalf, R. 562; *Dilk v. Keighley*, 2 Esp. R. 480. But see *Breed v. Judd*, 1 Gray, R. 459, in which it is said by the court, "we suppose an infant, who had learned the trade of a carpenter, might be charged with a chest of tools necessary to do his labor as a journeyman, or a laborer with his pickaxe and spade. If the going to California to labor was, in view of the plaintiff's situation and condition in life, a reasonable and prudent step, it would be difficult to say that he might not be charged with the expenses of the outfit." See also *Coates v. Wilson*, 5 Esp. R. 152.

² *Tupper v. Cadwell*, 12 Metcalf, R. 562. Mr. Justice Dewey says: "It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if, by it, it be intended to sanction an inquiry, in each particular case, whether the expenditure, or articles contracted for, were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in law termed beneficial to the infant. What subjects of expenditure are included in this class is a matter of law, to be decided by the court. The further inquiry may often arise, whether expenditures, though embraced in this class, were necessary and proper, in the particular case; and this may present a question of fact. It is, therefore, a preliminary question to be settled, whether the alleged liability arises from expenditures for what the law deems 'necessaries,' and unless that be shown, it is not competent to introduce evidence to show that, in a pecuniary point of view, the expenditure was beneficial to the minor, as that is irrelevant."

³ *Tuberville v. Whitehouse*, 1 Car. & Payne, 94.

⁴ *Bacon*, Abr. Infancy and Age, I. 1; *Bent v. Manning*, 10 Verm. R. 225.

priate money so borrowed, to the procurement of necessities, he will not be liable for it in law, inasmuch as the contract arises upon the lending, and its validity would, at best, be dependent on a contingency, namely, — whether it was actually applied to procure necessities; and if this contingency occur, it cannot, by *ex post facto* operation, make the contract absolutely binding.¹ But if the money were borrowed for the express purpose of purchasing particularly specified articles, which are necessary, ought not the lender to be treated as having himself supplied the articles, through the agency of the infant, and so be permitted to recover, as for goods sold? He would certainly be entitled to relief in chancery, in such a case.²

§ 80. But an infant cannot bind himself either by parol contract or deed, to pay a *sum certain*, even for necessities; for he is not to be precluded by the form of his contract from his right of estimating the actual worth of the articles supplied, beyond which he is not bound.³ Thus, an infant has been held not to be liable on an account stated,⁴ nor on a bill of exchange accepted,⁵ nor on a promissory note given for neces-

¹ Earle v. Peale, 1 Salk. 386; Darby v. Boucher, 1 Salk. 279; Probart v. Knauth, 2 Esp. R. 472, n. 1; Com. on Cont. 161; Bac. Abr. Infancy and Age, I. 1. "The court knows of no contracts, but what are good or bad at the time of the contract made, and not to be one or the other, according to a subsequent contingency." Earle v. Peale, 10 Mod. 67.

² 2 Evans's Pothier on Obl. 26; Marlow v. Pitfield, 1 P. W. 558; Reeves' Domestic Relations, Parent and Child, 330. See Clark v. Leslie, 5 Esp. N. P. C. 28; Randall v. Sweet, 1 Denio, R. 460.

³ Bacon, Abr. Infancy, I. 1; 2 Kent, Comm. Mitchell v. Reynolds, 467; 10 Mod. 85; Earle v. Reed, 10 Metcalf, R. 387; Dubose v. Wheddon, 4 McCord, R. 221.

⁴ Wood v. Witherick, Noy, 87; s. c. Latch, 169; Trueman v. Hurst, 1 T. R. 40; Bartlett v. Emery, 1 T. R. 42, note (a); Ingledew v. Douglas, 2 Stark. R. 36. But see Williams v. Moor, 11 Mees. & Welsb. 256, in which an infant is held to be responsible on an account stated.

⁵ Williamson v. Watts, 1 Camp. 552.

saries, unless he ratify them upon coming of age.¹ Indeed, in all the modern decisions, there is a strong tendency manifested to treat all the contracts of infants, which are not unquestionably and absolutely injurious to the infant, as merely voidable and not void. This, in truth, seems to be by far the more equitable doctrine, since while it affords entire protection to the infant, it also, by enlarging his capacity, operates as a benefit to him, and at the same time operates less to the injury of the adult.

§ 81. It was formerly held, that an infant was bound by his single bill for necessities, and that an action of debt would lie on such an obligation. But this instrument is now almost wholly disused in England, and it has been doubted whether the rule is now law.² An infant's penal bond has also been held to be void, though given for necessities; but this does not destroy the simple contract upon which the infant still remains liable, because the bond never had any force.³

§ 82. In the next place, as to the liability of the father in respect to the contracts of his infant child. The liability of the father being founded upon the legal presumption that his child is his authorized agent, it is essential that the articles supplied or service rendered to the infant should appear to have been with the assent and by authority of the father.⁴ It is not,

¹ Ante, § 58.

² Chitty on Cont. 150; 20 Am. Jur. (No. 40), 285.

³ Co. Lit. 172, a; *Ayliffe v. Archdale*, Cro. Eliz. 920; Bac. Abr. Infancy and Age, I. 1; *Hunter v. Agnew*, 1 Fox & Smith, 15.

⁴ In *Baker v. Keen*, 2 Stark. R. 501, Abbott, C. J., said: "A father would not be bound by the contract of his son, unless, either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father, who had an imprudent son, might be prejudiced to an indefinite extent; it was therefore necessary, that some proof should be given that the order of a son was made by the authority of his father. The question, therefore, for the consideration of the jury was, whether, under the circumstances of the particular case, there was sufficient

however, necessary that an express assent or authorization should be given by the father; it will be implied from the cir-

to convince them that the defendant had invested his son with such authority. He had placed his son at the military college at *Harlow*, and had paid his expenses whilst he remained there. The son, it appeared, then obtained a commission in the army, and having found his way to *London* at a considerable distance from his father's residence, had ordered regimentals and other articles suitable to his equipment for the *East Indies*. If it had appeared in evidence that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere, the circumstance might have rebutted the presumption of any authority from the defendant to order them from the plaintiff. Nothing, however, of this nature had been proved, and since the articles themselves were necessary for the son and suitable to that situation in which the defendant had placed him, it was for the jury to say, whether they were not satisfied, that an authority had been given by the defendant." In *Fluck v. Tollemache*, 1 Car. & P. 5, the infant was a cadet of fifteen years of age, to whom the plaintiff had supplied clothes, and the father, on the bill being sent to him, refused to pay it. Burroughs, J., said to the jury: "An action can only be maintained against a person for clothes supplied to his son, either when he has ordered such clothes, and contracted to pay for them; or when they have been at first furnished without his knowledge, and he has adopted the contract afterwards; such adoption may be inferred from his seeing his son wear the clothes, and not returning them, or making at, or soon after the time, when he knows of *their* being supplied, some objection. Here, the only knowledge that it appeared the defendant had of the transaction, was being asked for the money; he then repudiated the contract altogether. It would be rather too much, that parents should be compellable to pay for goods that any tradesman may, without their knowledge, improvidently trust their sons with." So, also, the same rule was held in *Blackburn v. Mackey*, 1 Car. & Payne, 1, and *Rolf v. Abbott*, 6 Car. & Payne, 286; *Clements v. Williams*, 8 Car. & Payne, 58; *Seaborne v. Maddy*, 9 Car. & Payne, 497; *Shellon v. Springett*, 20 Eng. Law & Eq. R. 281, and *Mortimore v. Wright*, 6 Mees. & Welsb. 482. In this case Lord Abinger said: "I am clearly of opinion that there was no evidence for the jury in this case and that the plaintiff ought to have been nonsuited. The learned judge was anxious, as judges have always been in modern times, not to withdraw any scintilla of evidence from the jury; but he now agrees with the rest of the court, that there ought to have been a nonsuit. In the present instance, I am the more desirous to make the rule absolute to that extent, in order that there may be no uncertainty as to the law upon this subject. In point of law, a father who gives no authority, and enters into no contract, is no more liable

cumstances of the case, and wherever he has actual knowledge of a contract entered into by his child and does not expressly object, the law implies an assent thereto. Thus, if articles be delivered for the son at the father's house, or if he see his son wearing clothes which he himself has not purchased, it would be sufficient to render him liable *prima facie*, although he may refute such a presumption.¹ (So, also, where

for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. With regard to the case in the Court of King's Bench, of *Law v. Wilkin*, if the decision is to be taken as it is reported, I can only say that I am sorry for it and cannot assent to it. It may have been influenced by facts which do not appear in the report; but as the case stands, it appears to sanction the idea that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative; which is a doctrine I must altogether dissent from. If a father does any specific act from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child, affords no inference of a legal promise to pay his debts; and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person; and it would bring the law into great uncertainty, if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices." See also *Thayer v. White*, 12 Metcalf, R. 343; *Gordon v. Potter*, 17 Verm. R. 50; *Edwards v. Davis*, 16 Johns. R. 284; 13 Johns. R. 480; *Pidgin v. Cram*, 8 N. Hamp. R. 353; *Rolf v. Abbott*, 6 Car. & Payne, 287; *Urmston v. Newcomer*, 4 Ad. & Ell. 809; *Seaborne v. Maddy*, 9 Car. & Payne, R. 497; *Finch v. Finch*, 22 Conn. R. 411; *Hunt v. Thompson*, Scam. R. 180; *Owen v. White*, 5 Porter, R. 435; *Clements v. Williams*, 8 Car. & Payne, 58; *Blackburn v. Mackay*, 1 Car. & Payne, 1; *Turguard v. Dawson*, 1 Crompt. Mees. & Roscoe, 710, note; *Mortimer v. Wright*, 6 Mees. & Welsb. 482; *Van Valkenburgh v. Watson*, 13 Johns. R. 480; *Gordon v. Potter*, 17 Verm. R. 348; *Varney v. Young*, 11 Verm. R. 258; *Benson v. Remington*, 2 Mass. R. 113.

¹ *Fluck v. Tollemache*, 1 Car. & Payne, 5 (*supra*); *Rolf v. Abbott*, 6

similar contracts have been previously made by the child, and assented to by the father, such fact would furnish a presumption of liability on the part of the father, which he must rebut by plain evidence to the contrary, — as for instance, that he prohibited the tradesman in the actual case, — or he will be held liable.¹ But whether the circumstances import assent in the particular case, is a question for the jury.

§ 82 *a*. Where the contract is not for necessities, the father's authority and assent thereto must clearly appear, for

Car. & Payne, 286; Deane *v.* Annis, 11 Maine R. 26; Thayer *v.* White, 12 Metcalf, R. 343. In Law *v.* Wilkin, 6 Ad. & Ell. 718, the defendant's son was at school, and appearing to be in want of clothes, the defendant supplied him. When the boy went home, he took the clothes with him but did not wear them. There was no evidence that the father ever saw the clothes, or knew any thing about them. The judge at *nisi prius* nonsuited the plaintiff on the ground that there was not sufficient evidence to charge the defendant; but the Court of King's Bench set it aside on the ground that there was *some* evidence; and Lord Denman said: "A father is properly liable for any necessary provision made to his infant son." But in Mortimore *v.* Wright, 6 M. & W. 482, Lord Abinger said: "With regard to the case of Law *v.* Wilkin, if the decision is to be taken as it is reported, I can only say that I am sorry for it, and cannot assent to it." See *supra*.

¹ In the case of Bryan *v.* Jackson, 4 Conn. R. 288, where the defendant's infant son had previously bought goods of the plaintiff which had been paid for by the defendant without objection, or notice not to trust his son further, and the son afterwards took up goods of a similar nature, which were sued for; it was held, that the previous payments were a recognition of the son's authority by which the father was rendered liable, — although he had ordered his son to contract no more debts, such prohibition not being made known to the plaintiff. See also McKenzie *v.* Stevens, 19 Alabama R. 691; Dean *v.* Annis, 14 Maine R. 26. In the case of Thayer *v.* White, 12 Metcalf, R. 343, goods had been previously bought of T. by the defendant's son, a minor, with the defendant's express consent. Subsequently the son bought goods again of T. in the name of his father, on six months' credit, and wrote to his father informing him thereof, and the father made no reply, and it was held that the jury were warranted in inferring the consent of the father from his silence, and that he was therefore liable. See also Baker *v.* Keen, 2 Stark. R. 501; Van Valkenburgh *v.* Watson, 13 Johns. R. 480; Mortimer *v.* Wright, 6 Mees. & Welsb. 482.

the question is one purely of agency,—but where the child lives with his father and the contract is for absolute necessities, the obligation of the father being a mixed one of legal and moral duty, his authority and assent might, perhaps, be presumed. Mere moral obligation, however, in no case is sufficient to create a liability on the part of the father, even for necessities, and unless the circumstances be such as to bear an implication of assent, he will not be responsible.¹ But in case of necessities his assent will be implied from slighter circumstances than where the contract is for articles not necessities. Where, however, the father expressly express his dissent to the contract, he of course will not be bound thereby, and so, also, where the circumstances show that articles were supplied contrary to his wishes, he is absolved from responsibility.²

§ 82 *b*. Where the child does not live with the father, stricter proof would be required of his assent, than where they live together, since in the latter case the presumption of assent grows more naturally out of the case. Where the child is entirely deserted by the father, it is not settled whether the father would be liable, even for necessities, but it seems, on broad principles, that the moral obligation of a father to his

¹ *Mortimore v. Wright*, 6 Mees. & Welsb. 482; *Chilcott v. Trimble*, 13 Barb. R. 502; *Shelton v. Springett*, 20 Eng. Law & Eq. R. 281, and Bennett's note. *Gordon v. Potter*, 17 Verm. R. 348; *Raymond v. Loyl*, 10 Barb. R. 483. See also, cases cited above.

² In *Gordon v. Potter*, 17 Verm. R. 350, Redfield, J., says: "But there is one defect in the case, which we think must clearly, and indisputably, preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly, or by implication, to pledge his credit for the articles; but the contrary. And unless the father can be made liable for necessities, for his infant child, against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of judges, or of elementary writers, which seem to justify the conclusion, that the parent may be made liable for necessities for his child, even against his own will. But an examination of all the cases upon this subject will not justify any such conclusion."

child ought to create such a liability, in cases where the child is of weak age and unable to support himself, at least so far as to prevent him from perishing by actual destitution. But the authorities do not support this doctrine, and it is said that in case the child is utterly deserted by the father, "his sole resource in the absence of any thing to show a contract express or implied on the father's part, is to apply to the parish, and then the proper steps can be taken to enforce performance of the parent's legal duty."¹

¹ Per Jervis, C. J., in *Shelton v. Springett*, 20 Eng. L. & Eq. R. 231, Mr. Justice Maule said: "I am of the same opinion. People are very apt to imagine that a son stands in this respect upon the same footing as a wife. But that is not so. If it be asked, is, then, the son to be left to starve,—the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support. That is the course which the law points out. But the law does not authorize a son to bind his father by his contracts. Upon the evidence in this case, it is clear there was a total absence of authority in the son to contract on the part of the father the debt now sued for. The plaintiff originally contracted with the son, intending to trust him for payment. There is nothing in the correspondence from which we can infer an intention on the father's part to confer authority upon the son to contract a liability for him. The letter written by the defendant's attorney does not admit, or give any color of admission of, an original liability. I think there is not even what is called a *scintilla* of evidence. But it is quite clear that there is not such evidence as would justify a jury in finding a verdict for the plaintiff. I therefore agree with my lord, that the rule must be made absolute to enter a nonsuit." In the case of *Urmston v. Newcomer*, 4 Adolph. & Ell. 903, the question, whether a father deserting his infant child, would be liable for necessities, did not arise exactly, because the child was left with relations who were able to support him, and whom the father understood to undertake to do so. Under these circumstances it was held, that the father having reasonable grounds to suppose the child provided for, was not liable; but the court declined to give an opinion as to what the law would be in case of utter desertion without any such circumstances. See *Maule v. Maule*, 1 Wils. & Shaw, 266. In 1 Black. Comm. 449, it is said, "No person is bound to provide a maintenance for his issue unless where the children are impotent and unable to work either through infancy, disease, or accident, and then is only obliged to find them with necessities, the penalty in refusal being no more than 20s. a month." The liability there alluded to is, however, to Stat. 43 Eliz. c. 2, s. 7, and it was argued in this case of *Urmston v. Newcomer*, that the existence of the statute

§ 82 c. If the father be in a state of separation from his wife,

showed an absence of common law liability. Sir John Campbell, in this connection, said: "By the common law, if a child perish for want of proper care, it is murder in the person neglecting it." Lord Denman added: "If the person has the actual custody," — and Patteson, J., said: "or the child be part of his family. Would it be murder in a parent to abscond?"

In *Stanton v. Wilson*, 3 Day, R. 37, the father was divorced from the mother (the plaintiff,) and two of the children were in her custody, a third remained with the father for some time, but fled from him through fear of violence and abuse, went to live with the mother and her second husband, and the action was brought to recover the expenses of maintenance and education. The court held the father liable, two judges dissenting, and said: "Parents are bound by law to maintain, protect, and educate their legitimate children, during their infancy, or nonage. This duty rests on the father; and it is reasonable it should be so, as the personal estate of the wife, and in her possession at the time of the marriage, becomes the property of the husband, and instantly vests in him. By the divorce, the relation of husband and wife was destroyed; but not the relation between Bird and his children. His duty and liability, as to them, remained the same, except so far forth as he was incapacitated, or discharged by the terms of the decree. This decree takes from him the guardianship of two of his children; and with it the right, which as natural guardian, he might otherwise have exercised; and releases him from those duties only which a guardian, as such, is bound to perform. This transfer of the guardianship to the plaintiff vested her with power similar to those of guardians, in other cases; and the appointment of the plaintiff to this trust did not subject her to the maintenance of the children, her wards, any more than a stranger would have been subjected by a like appointment. By accepting the trust, she became bound to provide for, protect, and educate them, at the expense of Bird, unless the decree of the general assembly has made other adequate provision, which, by the terms of that decree, she is bound to apply. This is not the case here. The sum allowed was directed to be paid to her *as her part and portion of Bird's estate, and in lieu of all claims of dower.*

"Articles furnished by a guardian for the necessary support, maintenance, and education of his ward, or by others at his request, are proper articles to be charged on book. *Book debt* is the proper action; and the party is, by statute, in this action, made a competent witness. What articles are to be considered as *necessaries* must depend, in some measure, on the circumstances of the party for whom they are furnished. The court can only instruct the jury as to the *classes of articles*, which, by law, are considered as necessaries, but the *quantity*, or *extent* to which they have been furnished is a fact to be left to the jury; and to what amount they shall be allowed must depend on their discretion. It may be generally true, that minors

and allow his child to live with her, he impliedly constitutes her

under the government of parents cannot bind their parents for necessities without their consent. The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by the artful and designing, furnishes a sufficient reason for the rule ; but neither the rule nor the reasoning, will apply to the charges in respect to two of the children in this case. The articles were furnished by the guardian herself, or at her request ; who in virtue of her trust, had full power to contract, and make the father liable for necessities, not only *without* but *against* his consent.

“ With respect to the charges on account of Herman’s support, if it is admitted, that ‘ he eloped from his father for fear of personal violence and abuse, and could not with safety live with him,’ every reason for the rule that can be given, ceased to operate. Protection and obedience are relative duties ; and when the wisdom that should guide the infant is lost in delirium, and the arm that should protect, and the hand that should feed him, is lifted for his destruction ; obedience is no longer a duty, and the child cannot with any propriety be said to be under the government of a father. But because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education, and support. The duty remains, and the law will enforce its performance, or there must be a failure of justice. The infant cast on the world must seek protection and safety where it can be found ; and where, with more propriety can it apply, than to the next friend, nearest relative, and such as are most interested in its safety and happiness ? The father having forced his child abroad to seek a sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say it was furnished without his consent, or against his will.”

But see *Gordon v. Potter*, 17 Verm. R. 350, where the contrary doctrine is held. In this case Redfield, J., said : “ It is obvious that the law makes no provision for strangers to furnish children with necessities, against the will of parents, even in extreme cases. For if it can be done in extreme cases, it can in every case, where the necessity exists ; and the right of a parent to control his own child will depend altogether upon his furnishing necessities, suitable to the varying taste of the times. There is no stopping place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by statute, compel a proper maintenance. But this, according to the English common law, which prevails in this State, is not the right of every intermeddling stranger.” The same doctrine is held in *Raymond v. Loyl*, 10 Barb. R. 483, that there is no legal obligation on a parent to maintain his child independent of statute. See also *Hunt v. Thompson*, 3 Seam. R. 180 ; *Varney v. Young*, 11 Verm. R. 258 ; *Chilcott v. Trimble*, 13 Barb.

his agent to supply the child with necessities.¹ And this would be especially the case, where the father has a right to the child.² So, also, where, in the absence of her husband, a wife contracted for the board of her daughter, who was a minor, at a particular place, and the child stayed there for a certain time, and then was removed by her mother to another place, and an action was brought for the board in the latter place, it was held, that as the husband had paid the board at the first place, he thereby impliedly acknowledged the discretionary power of his wife to contract for such purpose, and therefore that he was liable.³

R. 352. But in *Dennis v. Clark*, 2 Cushing, R. 353, Metcalf, J., said: "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound, by the same law and by the common law of England, to support and provide for his wife. 2 Mass. 115, 419. Now, it is clearly the law of England, as well as of this commonwealth, that if a husband desert his wife, or wrongfully expel her from his house, and make no provision for her support, a person who furnishes her with necessary supplies may compel the husband, by an action at law, to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children. In England, however, the liability of a father, in such case, is matter of doubt, depending, it seems, upon another question equally doubtful; namely, whether he is bound, by the common law, to maintain his infant children. *Urmston v. New-comer*, 6 Nev. & Man. 454, and 4 Adolph. & Ellis, 899. That was an action against a father to recover pay for boarding, clothing, etc., his infant daughter. The court held, upon the facts of the case, that the father was not liable to the action. But they declined to give an opinion upon 'the general question, whether, by the common law, a parent is bound to maintain his deserted legitimate child.' Coleridge, J., said that his opinion was, that a parent was not so bound. 6 Nev. & Man. 466. Neither of the other judges intimated an opinion on the question. See *Cro. Eliz.* 849; *O. Bridgm.* 257; 4 East, 84; 6 Mees. & Welsb. 488; 9 Car. & P. 497." See also *Owen v. White*, 5 Porter, R. 435. In the matter of *Ryder*, 11 Paige, R. 187.

¹ *Rawlins v. Vandyke*, 3 Esp. R. 250, 252; *Rumney v. Keyes*, 7 N. Hamp. R. 571.

² *Rex v. Greenhill*, 4 Adolph. & Ell. 624.

³ *Forsyth v. Milne*, Sitt. after M. T. 1808, K. B. cited in *Chitty on Cont.* 147; *Paley on Principal and Agent*, 120, note 2. See also *Bryan v. Jackson*, 4 Conn. R. 288; *McKenzie v. Stevens*, 19 Ala. R. 691; *Thayer v. White*, 12 Metcalf, R. 343.

§ 82 *d*. Where the child voluntarily leaves the father, the latter would not be responsible for any debts unless his authorization and assent were distinctly proved, or unless, perhaps, in cases of absolute necessity in so far as to prevent the child from perishing. *A fortiori* the father would not be liable in such cases, where it appears that the child was able to support himself, and actually did earn enough to pay for strict necessities.¹

§ 82 *e*. The term "necessaries" as relating to the liability of the father, receives a much more strict and limited construction, than when it relates to the child — and the father without his assent express or implied, would never be liable for any thing but absolute necessities; and if a father give a son a reasonable allowance, he would not be liable even for things strictly necessary.²

§ 82 *f*. Again, if a person adopt the relationship of a father, or hold out the child as being his own, he will be liable in like manner as if it were truly his child, although it be illegitimate, or although it be the child of other persons.³ But a father-in-

¹ In *Rolf v. Abbott*, 6 Car. & Payne, 286, the defendant's son who was nineteen years of age and had a situation worth £90 a year, ordered clothes of a tailor who sent the bill to the father. Gurney, J., said to the jury: "The question in this case is, whether these clothes were supplied to the son of the defendant by the assent of the defendant. For, to charge him, it is essential that the goods should have been supplied with his assent, or by his authority. Indeed, if the law were not so, any one of you who had an imprudent son might have bills to a large amount at the tailors, the hatters, the shoemakers, and the hosiers, and you know nothing at all about it." In *Blackburn v. Mackey*, 1 Car. & Payne, 1, the defendant's son was a minor living away from his father as a clerk in London, and receiving a guinea a week as wages. The father did not supply him with clothes, and being greatly in need of them, he bought them, and suit was brought to recover their price of the father. But Abbott, C. J., told the jury that "a father was not bound to pay for articles ordered by his son, unless he had given some authority, express or implied." See also *Baker v. Keen*, 2 Stark. R. 501.

² *Crantz v. Gill*, 2 Esp. N. P. C. 471.

³ *Hesketh v. Jowring*, 5 Esp. R. 131; *Cameron v. Baker*, 1 Car. & Payne, 268; *Nichole v. Allen*, 3 Car. & Payne, 36.

law is not, at the common law, bound to maintain his wife's children by a former marriage, unless he take them into his house, and assume the character of parent, or adopt them as his own.¹ But if he educate and support them, he cannot recover a remuneration therefor, unless there be an express promise to repay him.²

§ 82 *g*. Whether, the father being dead, the mother is liable for the support of her infant children, does not seem to be entirely settled, but the inclination of authority is against her liability.³ At all events, it is well established that the mother could, in no case, be liable to the same extent as the father for the maintenance of the child.⁴

§ 82 *h*. The legal obligation of the father to pay for the maintenance and support of the children, does not seem to be annulled by the fact that the child has an independent property of his own,⁵ although generally, courts of equity incline to appropriate to the maintenance of the child the income of his own property;⁶ and where the father is without means to educate and support his children, courts of equity will always make a

¹ *Tubb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, R. 76; *Stone v. Carr*, 3 Esp. 1; *Treto v. Brown*, 4 Mass. R. 635; *Minden v. Cox*, 7 Cowen, R. 235. This is made otherwise by Statute of 4 & 5 Will. 4, ch. 76, § 57, in England.

² *Pelly v. Rawlins, Peake*, Ad. Cas. 226; *Cooper v. Martin*, 4 East, R. 76; *Williams v. Hutchinson*, 5 Barb. R. 122.

³ *Tilton v. Russell*, 11 Ala. R. 497; *Pray v. Gorham*, 31 Maine R. 241; *Raymond v. Loyl*, 10 Barb. S. C. R. 483; *Commonwealth v. Murry*, 4 Binney, R. 487, are against the obligation of the mother. But see *contra* *Benson v. Remington*, 2 Mass. R. 113; *Nightingale v. Withington*, 15 Mass. R. 274; *Hughes v. Hughes*, 1 Bro. Ch. R. 387.

⁴ *Ibid.* *Dawes v. Howard*, 4 Mass. R. 97; In the matter of *Ryder*, 11 Paige, R. 185.

⁵ *Dawes v. Howard*, 4 Mass. R. 97; In the matter of *Kane*, 2 Barb. Ch. R. 375.

⁶ *Jervoise v. Silk*, Cooper, Eq. R. 52; *Maberly v. Turton*, 14 Verm. R. 499; *Simon v. Barber*, 1 Tamlyn, R. 22.

prospective allowance for such purpose out of the property of the children.¹

(§ 82 *i.* In consideration of this obligation on the part of the father to maintain his children, the law gives him a right to all their earnings.² But whenever this obligation fails, the right fails likewise; and if the children support themselves, or their maintenance is from their own property, or if they live with their mother when separated from the father, the father will not be entitled to their earnings.³ So, also, the father may relinquish his claim to the earnings of his child, by emancipating him, or by contract with those for whom he works, allowing them to pay the child the wages for his labor, or by any act importing an intention to abandon all claim thereto.⁴)

§ 82 *j.* An infant must sue by guardian, or *prochein ami*.⁵ And if he have a guardian, he may, with his consent, sue by the *prochein ami*; ⁶ but he can only defend by guardian.⁷ The *prochein ami* is not, however, to be considered as a party to the suit, but merely as an attorney, having power to prosecute the right of the infant, but not to do any act to his injury, such as

¹ *Newport v. Cook*, 2 Ashmead, R. 332; In the matter of Kane, 2 Barb. Ch. R. 375.

² *Benson v. Remington*, 2 Mass. 113; *Shute v. Dorr*, 5 Wend. R. 204; *Clapp v. Green*, 10 Metcalf, R. 409; Ante, § 74 *a*; *Nightingale v. Withington*, 15 Mass. R. 274.

³ *Wodell v. Coggeshall*, 2 Metcalf, R. 89; *Chilson v. Phillips*, 1 Verm. R. 41; *Gale v. Parrott*, 1 N. Hamp. R. 28; *Treto v. Brown*, 4 Mass. R. 675.

⁴ See ante, § 74 *a*; *Jenny v. Alden*, 12 Mass. R. 375; *Whiting v. Earle*, 3 Pick. R. 201; *Varney v. Young*, 11 Verm. R. 258; *Burlingame v. Burlingame*, 7 Cowen, R. 92; *Canovar v. Cooper*, 3 Barb. S. C. R. 115; *Clinton v. York*, 26 Maine, R. 167.

⁵ 2 Inst. 261, 390; Co. Litt. 135 b.; Cro. Car. 86; Cro. Jac. 161.

⁶ *Thomas v. Dike*, 11 Verm. R. 273; *Hardy v. Scanlin*, 1 Miles, (Penn.) 87; *McGiffin v. Stout*, Coxe, R. (N. J.) 92; *Trask v. Stone*, 7 Mass. R. 241; *Rucker v. McNeely*, 4 Blackf. (Ind.) 179; *Bouche v. Ryan*, 3 Ibid. 472.

⁷ Hutt. 92; Palm. 225; 1 Roll. Abr. 287; Cro. Jac. 645. See note to *Bingham on Infancy*, p. 123.

to release or compromise his suit.¹ Payment to him, without ratification by the infant, is therefore no satisfaction of a recovery;² and the suit may be compromised and dismissed without his consent.³ His power over the subject-matter commences with the suit, and if a previous demand were necessary to perfect the cause of action, he cannot maintain it.⁴

MARRIED WOMEN.

§ 83. 4th. We now come to the fourth division of persons incompetent to contract, namely, married women. The general rule of law is, that a married woman cannot, during her coverture, make an obligatory contract.⁵ Her legal existence is, during such period, merged in that of her husband, and neither she nor he can be sued upon her contracts, unless they are ratified or assented to by him. Upon marriage, all her personal estate is vested in her husband; he assumes all her debts, and may sue upon all her choses in action, and receive the profits of her labor. Yet no choses in action, unless they be reduced to possession before her death, will survive to the husband,—and if he die before reducing them to possession, they become the wife's sole property,⁶—and if she die before they are reduced to his possession, they go to her heirs.⁷ So, also, he is only jointly liable with her for her debts con-

¹ *Sinclair v. Sinclair*, 13 Mees. & Welsb. 640; *Crandall v. Slaid*, 11 Metcalf, R. 288; *Miles v. Kaigler*, 10 Yerg. R. (Tenn.) 10; *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Brown v. Hull*, 16 Verm. R. 673.

² *Allen v. Roundtree*, 1 Speer, (S. C.) 80; *Smith v. Redus*, 9 Ala. R. 99; *Bethea v. McCall*, 3 Ibid. 450.

³ *Longnecker v. Greenwade*, 5 Dana, R. 516.

⁴ *Miles v. Boyden*, 3 Pick. R. 213.

⁵ *Marshall v. Rutton*, 8 T. R. 545; *Lewis v. Lee*, 3 Barn. & Cres. 291; *Faithorne v. Blaquiere*, 6 Maule & Selw. 73.

⁶ *Bacon, Abr. Baron and Feme*, C. 3; *Gaters v. Madely*, 6 Mees. & Welsb. 423.

⁷ *Betts v. Kimpton*, 2 Barn. & Adolph. 273; *Pattee v. Harrington*, 11 Pick. R. 221.

tracted before her marriage, and he cannot be sued alone without some new consideration to him, (as delay or inconvenience to the creditor,) and in case of her death, he is absolved from liability therefor,¹ whether he received a fortune by her or not. There is, however, one exception to this rule, which obtains when a promissory note or bill of exchange is given to her while unmarried, in which case, the marriage is considered as an indorsement to the husband, and he can sue upon it alone.² The freehold and inheritance of the wife are subject, however, to other rules and regulations; for the husband does not by the marriage acquire an absolute power over them, so as to enable him to make a sale of them without her consent, but he has only a right to receive the rents and profits accruing from them during her life.³ It is the policy of the law, in order to prevent domestic discord, to create a legal unity; it therefore makes the will of one paramount, according to the Homeric maxim,

“Οὐκ ἀγαθὸν πολυκοιρανίη: εἰς κοίρανος ἔστω.”⁴

§ 84. In respect to the powers and rights of married women, the law is by no means abreast of the spirit of the age. Here are seen the old fossil footprints of Feudalism. The law relating to women tends to make every family a barony, or a monarchy, or a despotism, of which the husband is the baron, king, or despot, and the wife the dependent, serf, or slave. That this is not always the fact is not due to the law, but to the enlarged humanity which spurns the narrow limits of its rules. The progress of civilization has changed the family

¹ *Melchinson v. Howson*, 7 T. R. 348; *Richardson v. Hall*, 1 B. & B. 50; *Com. Dig. Baron et Feme*, (E.) (C.) 2 and (n.); *Heard v. Stamford*, *Cas. Temp. Talb.* 173; s. c. 3 P. Wms. 409; 1 *Chitty, Plead.* (6th ed.) 33; *Ramsey v. George*, 1 Maule & Selw. 180; *Milner v. Milner*, 3 T. R. 631; *Pittam v. Foster*, 1 Barn. & Cres. 248.

² *McNeilage v. Halloway*, 1 Barn. & Ald. 218.

³ *Bacon, Abr. Baron and Feme*, C. 1, D. 1.

⁴ *Iliad*, II. 204. See also the preceding lines.

from a barony to a republic, — but the law has not kept pace with the advance of ideas, manners, and customs. And although public opinion is a check to legal rules on this subject, the rules are feudal and stern. Yet the position of woman throughout history serves as the criterion of the freedom of a people or an age. When man shall despise that right which is founded only on might, woman will be free, and stand on an equal level with him — a friend and not a dependent. Unity of man and wife can never be created by law, but by nature; and where there is discord, no legal rules can create harmony. The first step to any reform on this subject is to enable a married woman to hold property independently of her husband, without the intervention of trustees, which is only an awkward and useless form, the tendency of which is to create ill-feeling and distrust between the married persons. No bad result can follow from enabling woman to hold what is her own; but while the fact of marriage entitles the husband to the fortune of the wife, he has her entirely at advantage and may abuse his power, to her injury. Besides, this rule of law offers a perpetual inducement to marriages for money instead of affection, and is, therefore, at variance as well with good policy as with morals. The only reasons by which it is supported are feudal, and are averse to the spirit of freedom.¹

¹ In Massachusetts it is now enacted by Statute, ch. 208, § 1 & 3, (Supplement, 1845,) that “At any time before a marriage shall be solemnized, the parties may enter into a contract in writing, declaring their consent that, after the marriage shall have been solemnized, the wife shall continue to hold either the whole or any designated part of the real or personal estate, or the right of action, of which she may be seized or possessed, at the time of the marriage, to her sole and separate use, free from the interference and control of her husband. Such contract may limit to the wife an estate for life in the whole or any part of the property, and designate any other limitations not repugnant to the laws of the Commonwealth; and all such limitations shall take effect at the time of the marriage, in like manner as if they had been contained in a deed conveying to the wife the property so limited.” “Any person, capable in law of making a deed or will, may convey, devise, or bequeath to any married woman, any property or estate to be held by her, without the

§ 85. There are, however, exceptions to this general rule, which have been introduced out of regard to the interests of man and the necessities of woman, in order to afford her the privilege of contracting to supply herself with necessaries, and to create a sufficient security for those who provide her with means of subsistence.

§ 86. 1st. The first of these exceptions is, where the husband is *civilitur mortuus*, that is, where he is under a legal disability to make any contract, and his civil existence is suspended; as where he is transported for life under a judicial sentence; or where he has entered some monastic institution; or where he is banished.¹ So, also, a temporary transportation of the husband enables the wife to sue as a *feme sole* during the term of transportation, but the husband's right revives upon his return.² This exception in favor of the wife during the transportation of the husband, was first created in the case of Thomas of Weyland,³ who was abjured the realm for felony, — and afterwards, in the case of Sir Robert Belknap, one of the justices of the Court of Common Pleas, who was banished to Gascony until he should obtain the king's favor, and his wife, Lady Belknap, brought an action in the common pleas, which was sustained.⁴ This action was commemorated by the lawyers of the day by a rhyming distich in Latin, which Lord Coke has handed down to us in his 1st Institute, to the following effect:—

intervention of a trustee, to her sole and separate use, free from the interference or control of her husband. Such conveyance, devise, or bequest, may be of an absolute estate, of an estate for life, or of a less estate, with any lawful limitations after the termination of the estate so vested in such woman." This is one step toward the reform which we advocate.

¹ Ex parte Franks, 7 Bing. R. 762; Marsh v. Hutchinson, 2 Bos. & Pul. 231; Year-Book, 2 Henry IV. 7.

² Spooner v. Brewster, 2 Car. & P. 35; Boggett v. Frier, 11 East, 304, note, (Day's ed.); Ex parte Franks, 1 Moore & Scott, 1.

³ Year-Book, 19 Edw. I. cited 1 Coke's Inst. 133 a.

⁴ Year-Book, 2 Henry IV. 7.

“ Ecce modo mirum, quòd fœmina fert breve Regis,
Non nominando virum conjunctum robore Legis.”¹

At the common law, imprisonment for life would not, as it seems, so extinguish the legal existence of the husband, as to render the wife competent to contract and render herself liable as a *feme sole*.² But in some of the States of the United States, the wife is enabled, by statute, to demand a divorce *a vinculo matrimonii*, if the husband be sentenced to imprisonment for the term of life, or for seven years or more, and his pardon will not revive his conjugal rights, after a divorce for such cause.³

§ 87. 2d. Another exception is where the husband has been absent and unheard of for a period of seven years, in which case the law, presuming that he is dead, allows to the wife all the rights of a *feme sole* to contract; at least, unless it be proved that he is still living.⁴

§ 88. 3d. Another exception is by the custom of London, by which a married woman may carry on a trade separately from her husband, and on her own account, and if the husband do not interfere to oppose it, she may, as to all the transactions connected with that business, be treated as a single woman. She may sue and be sued; and although the husband must be made a nominal party to the suits, both by and against her, yet she is considered as the real party in interest, and the judgment does not affect the husband.⁵

¹ 1 Coke's Inst. 132 *b*.

² *Boggett v. Frier*, 11 East, 304; Co. Litt. 133, (note 209); *Marsh v. Hutchinson*, 2 Bos. & Pul. 231. But see *Ex parte Franks*, 1 Moore & Scott, 1, in which it was more recently decided, that the wife of a convicted felon, sentenced to transportation for fourteen years, but detained in confinement in the hulks, was liable to be made a bankrupt, if she traded on her own account.

³ Mass. Rev. Stat. ch. 76, § 5.

⁴ *Robinson v. Reynolds*, 1 Aik. 174.

⁵ *Bac. Abr. Baron & Feme*, M.; *Beard v. Webb*, 2 Bos. & Pul. 93; *Caudell*

§ 89. 4th. Another exception obtains in cases, where a husband utterly abandons his wife, and leaves the country without making any provision for her support.¹ Such an abandonment will be implied, whenever the husband deserts the wife, and leaves the country with a declared intention not to return, or under circumstances which unequivocally indicate such an intention.² So, also, when the wife is

v. Shaw, 4 T. R. 361. The same custom prevails in some of the United States, as in Pennsylvania and South Carolina. *Burke v. Winkle*, 2 Serg. & Rawle, 189; *Newbiggin v. Pillans*, 2 Bay, 162; *State v. Collins*, 4 McCord, 355; *McDowall v. Wood*, 2 Nott & McCord, 242; *City Council v. Van Roven*, 2 McCord, 465; *Megrath v. Robertson*, 1 Des. 445.

¹ *Abbott v. Bayley*, 6 Pick. 93; 2 Story, Eq. § 1387; Story on Part. § 11, p. 15; 2 Roper on Husband and Wife, ch. 18, § 4, pp. 174, 175; *Cecil v. Juxton*, 1 Atk. 278; *Lamphir v. Creed*, 8 Ves. 599; Com. Dig. Chancery, M. 211. This rule has been extended by the revised statutes of Massachusetts, to all cases where a married woman shall come from any other State or country into this State without her husband, he having never lived with her in Massachusetts. *Gregory v. Paul*, 15 Mass. 34. See also *De Gaillon v. L'Aigle*, 1 B. & P. 357; *Walford v. Duchess of Pienne*, 2 Esp. 554.

² *Gregory v. Pierce*, 4 Metcalf, R. 478. This was a case of assumpsit brought upon a promissory note made by a married woman, (the defendant,) who lived in Massachusetts, and whose husband left her and went to Ohio in 1818, and there remained till his death in 1832. Mr. Justice Shaw, in delivering the judgment, said, "The principle is now to be considered as established in this State, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, and has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had aljured the realm. *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89. In the latter case, it was held, that in this respect, the residence of the husband in another State of the United States, was equivalent to a residence in any foreign State; he being equally beyond the operation of the laws of the commonwealth, and the jurisdiction of its courts. But, to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the hus-

compelled by the cruelty of the husband to flee his house, and she quits the country, and he provides no means for her support, and maintains no relation with her, she will be entitled

band to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a feme sole. Such is the renunciation, coupled with a continued absence in a foreign State or country, which is held to operate like an abjuration of the realm. In the present case, the court are of opinion, that the circumstances stated are not sufficient to enable the court to determine whether the husband had so deserted his wife, when the note in question was given. The only facts stated are, that he was insolvent when he went away; that he was absent residing seven or eight years in Ohio; that he made no provision for his wife and her family, after 1816; and that she supported herself and them by her own labor. But it does not appear that he was of ability to provide for her; that he was not in correspondence with her; that he declared any intention to desert her, when he left, or manifested any such intention afterwards; or that he was not necessarily detained by sickness, imprisonment, or poverty. The fact of desertion by a husband may be proved by a great variety of circumstances leading with more or less probability to that conclusion; as, for instance, leaving his wife, with a declared intention never to return; marrying another woman or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances tending to prove the absolute desertion before described. The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception. In an agreed statement of facts, such fact of desertion, using this term in the technical sense above expressed, as a total renunciation of the marriage relation, must be agreed to, or such other facts must be agreed to, as to render the conclusion inevitable. If the facts stated are all that can be proved in the case, the court would consider that the plaintiff had not sustained the burden of proof, and therefore could not have judgment. See *Williamson v. Dawes*, 9 Bing. 292; *Stretton v. Bushnach*, 4 Moore & Scott, 678; s. c. 1 Bing. N. R. 139; *Bean v. Morgan*, 4 McCord, 148. But apprehending that the statement may have been agreed to, under a misapprehension of the legal effect of the facts stated, and that other evidence may exist, the court are of opinion, and do order, that the agreed statement of facts be discharged, and a trial had at the bar of the court of common pleas." See also *Bean v. Morgan*, 4 McCord, R. 148; and 2 Kent, Com. § 38, p. 157.

to sue and be sued as a *feme sole*.¹ In the United States this rule, also, would apply to cases where the wife was forced to leave the husband and live in a different State,² the States being considered in view of this rule as foreign countries. The presumption in all such cases, however, is that the husband will return, in case he have ever resided in the country; but it may be rebutted, — the real intent of the husband being the criterion of the right of the wife to contract as a *feme sole*. This exception is but an extension or new application of the old common law rule, that whenever the husband was banished or had abjured the realm, his wife could contract as a *feme sole*.³

§ 89 *a*. Connected with this exception is another, growing out of it, which obtains when the husband is an alien or foreigner, and has never lived in the country; in which case, he is presumed to have no intention to come to his wife, and she is, therefore, enabled to contract as a *feme sole*.⁴ But if he have ever resided in this country, the exception would not obtain.⁵

§ 90. 5th. Another and partial exception is where a husband and wife are divorced *a mensa et thoro*, (by which the marriage is not dissolved, but may be reëstablished by the agreement of both parties,) in which case the disability of the wife to contract is partially removed; and during such divorce she may sue her husband for the alimony decreed to her by

¹ Gregory v. Paul, 15 Mass. 31; McArthur v. Blonn, 2 Duer, 151.

² Abbott v. Bayley, 6 Pick. R. 93.

³ Belknap v. Lady Wayland, Co. Litt. 132 b. 133 a.; Ante, § 86.

⁴ Walford v. The Duchess of Pienne, 2 Esp. N. P. R. 554; De Gaillon v. L'Aigle, 1 Bos. & Pul. 357.

⁵ Kay v. Duchess of Pienne, 3 Camp. R. 123; Gregory v. Paul, 15 Mass. R. 31; Robinson v. Reynolds, 1 Aiken, R. 174.

the court, and may also bring suit in the ecclesiastical courts for any personal injury.¹

§ 91. The well-settled rule of the common law, which now obtains in the English courts, is, that coverture is a good plea, notwithstanding a divorce *a mensa et thoro*, and that no married woman can either sue or be sued as a *feme sole*, though living apart from her husband, and receiving an ample allowance for her separate maintenance, unless the husband be under some civil disability.² But the rule in some parts of this country differs from that of the common law of England, and allows the wife, during a divorce *a mensa et thoro*, to maintain suits, either for injuries done to her person or property, or upon contracts express or implied arising after the divorce, without joinder of the husband.³

§ 92. But, although, during her coverture, a married woman cannot render herself personally responsible on her contracts,

¹ *Motteram v. Motteram*, Part 3, Bulst. 264; *Chamberlain v. Hewitson*, 1 Lord Raym. 73; s. c. 5 Mod. 71; 2 Dane's Abr. 307.

² *Hatchett v. Baddeley*, 2 Blacks. 1082; *Lean v. Schutz*, 2 Bl. 1195; *Hyde v. Price*, 3 Ves. 443; *Marshall v. Rutton*, 8 T. R. 546. This rule, after many contradictory decisions, was finally settled in the last cited case, and is supported by all the modern cases. *Lewis v. Lee*, 3 B. & C. 291.

³ *Dean v. Richmond*, 5 Pick. 467; *Abbott v. Bayley*, 6 Pick. 89; 2 Kent, Comm. 157. See Revised Statutes of Massachusetts, part 2, tit. 7, ch. 77, as to the power of a married woman to contract, &c. *Pierce v. Burnham*, 4 Metcalf, R. 313. Mr. Chancellor Kent, in his Commentaries, Vol. II. Part IV. Lec. xxviii. p. 158, speaking of this rule says, "This is the more reasonable doctrine, and it seems to be indispensable that the wife should have a capacity to act for herself, and the means to protect herself, while she is withdrawn, by a judicial decree, from the dominion and protection of her husband. The court of Massachusetts has intentionally barred any inference that the same consequence would follow if the husband was imprisoned by law for a public offence or crime. But such a case might be equivalent to an abandonment of the wife, and ground for a divorce *a mensa et thoro*; and there is as much reason and necessity in that case as in any other, that the wife should be competent to contract, and to protect the earnings of her own industry."

yet if a contract be made with her on good consideration, during the marriage, the husband may, if he please, take advantage of it, and recover in an action upon it, making her a co-plaintiff in the suit. So, also, in such a case, if the husband do not elect to sue thereupon, her right to sue separately thereon remains merely in abeyance during his life, and survives to her personally upon his death.¹ Thus, where the wife had undertaken to cure a wound for the sum of £10, and the patient would not pay the agreed sum after he was cured; she and her husband brought suit against him, and recovered judgment, and a writ of error being brought thereon in the Exchequer Chamber, on the ground that a married woman could not sue, the court said that "being grounded in a promise made to the wife upon a matter arising upon her skill, and on a performance to be made to the wife, she is the cause of the action, and so the action brought in both their names is well enough, and such action shall survive to the wife,"—wherefore the judgment was approved.² All the earnings of the wife during her coverture, and all gifts to her are in the same predicament. So, also, upon all choses in action, such as a bond, bill of exchange, or promissory note, given to her during her separate life, the husband may either sue alone, or make her a co-plaintiff, and his indorsement will make such bill or note negotiable.³ But if, before he reduces such chose in action to his possession, she die, he can only sue thereupon as her administrator, and not personally.⁴ So, also, if he die before reducing it to possession, it becomes the sole property of the wife, and she can sue upon it alone.⁵ Again, if he should

¹ *Dougherty v. Snyder*, 15 Serg. & Rawle, 84; *Ankerstein v. Clarke*, 4 T. R. 616; *Gaters v. Madeley*, 6 Mees. & Welsb. 425; Post, § 83.

² *Brashford v. Buckingham*, Cro. Jac. 77.

³ *Mason v. Morgan*, 2 Adolph. & Ell. 30; s. c. 4 Nev. & Man. 46.

⁴ *Day v. Pargrave*, cited in *Philliskirk v. Pluckwell*, 2 Maule & Selw. 393; 1 Roll. Abr. 345.

⁵ *Woodman v. Chapman*, 1 Camp. R. 189; *Ankerstein v. Clarke*, 4 T. R. 616; *Philliskirk v. Pluckwell*, 2 Maule & Selw. 393; *Swann v. Gauge*, 1

join her name with his own as co-plaintiff, and bring an action thereupon, and should die after judgment, the wife would be entitled to the benefit of the chose in action, as the judgment would survive to her.¹

§ 93. Since, therefore, the husband, by reducing his wife's choses in action to his possession during his life, can acquire a personal right thereto, so as to prevent the survivorship of the remedy to her, it becomes necessary to consider what constitutes a reduction to possession. And in this respect the rule is, that the husband must appropriate them to himself by some precise and specific act evidencing a clear disagreement to the further continuing of a separate interest in the wife.² Thus, if a husband receive the money on a promissory note, or sue alone and recover upon a bond made to his wife, he

Hayw. (N. C.) 3; *Brown v. Langford*, 3 Bibb, 497; *Richards v. Richards*, 2 Barn. & Adolph. 447; *Ryland v. Smith*, 1 Mylne & Craig, 53; *Gaters v. Madeley*, 6 Mees. & Welsb. 423. In this case Baron Parke said: "This is an action on a promissory note — an instrument on which no one can sue unless he was originally a party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but a chose in action of a peculiar nature; but which has indeed been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange; yet still it is a chose in action, and nothing more. When a chose in action, such as a bond or note, is given to a *feme covert*, the husband may elect to let his wife have the benefit of it, or if he thinks proper he may take it himself; and if, in this case, the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is, and in that case the remedy on it survives to the wife, or he may, according to the decision in *Philliskirk v. Pluckwell*, 2 M. & Selw. 393, adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her."

¹ *Ibid.*

² *Scarpellini v. Atcheon*, 15 Law Jour. Q. B. 333; *Nash v. Nash*, 2 Madd. R. 133; *Ryland v. Smith*, 1 Mylne & Craig, 53; *Gaters v. Madeley*, 6 Mees. & Welsb. 425; *Bendix v. Wakeman*, 12 Mees. & Welsb. 97.

will have reduced it to his possession.¹ But the reception of interest on a chose in action, or even of a partial payment thereof, will only be a reduction to his possession of the portion received, and the remainder will survive to the wife.² So, also, possession by the husband in the capacity of executor or trustee is not such a reduction to possession as to destroy her right.³

§ 94. With these exceptions a married woman is incapacitated legally to enter into any contract, so as to bind herself personally, or to sue or be sued in her own name during her coverture.⁴ Her contracts are only binding upon her through his consent and ratification, and even then she cannot sue or be sued alone upon them. Thus, for instance, the common contracts which she makes with tradesmen to supply the family with necessaries, only bind the husband upon the presumption, that he has empowered her to act as his agent, which may be rebutted and negatived by evidence.⁵

§ 95. But connected with the wife's disabilities, and growing directly out of them, are certain privileges and immunities, to counterbalance, in some measure, the disadvantages imposed upon her by her coverture. She is not personally liable upon her contracts, and can throw the whole burden of those expenses, for which she would otherwise be liable, upon her husband, if they can be recovered of him at law; and if they cannot be recovered of him, she may utterly avoid them.

§ 96. This brings us to the consideration of those contracts entered into by the wife, for which the law makes the husband

¹ *Ryland v. Smith*, 1 Mylne & Craig, 53.

² *Nash v. Nash*, 2 Madd. R. 133; *Hart v. Stevens*, 14 Law Jour. Q. B. 148, cited *Smith on Contracts*, p. 223, note (b).

³ *Baker v. Hall*, 12 Ves. Jr. 497.

⁴ *Farrer v. Bessey*, 24 Verm. R. 89.

⁵ *Bac. Abr. Baron & Feme*, H. 3.

responsible. The general rule is, that the wife can only bind the husband by her contract, as his agent, acting under his authority or with his concurrence, either express or implied.¹ In cases where the consent of the husband is *expressly* given, little dispute can occur, and the question is solely for the jury. The great proportion of cases where the question whether the husband has authorized or assented to the contract of the wife arises, are where the authorization is to be *implied* from the circumstances.

§ 97. And in the first place, as to the liability of the husband for *necessaries* furnished to his wife. The consideration of this liability divides itself into two heads. *First*, when the contract is made while the husband and wife are living together; and *second*, when it is made while they are living apart.

§ 97 *a*. The rule applicable to the first class of cases is, that so long as the husband and wife cohabit, and he is apparently sustaining the marital relation, he is bound to supply her with necessaries. If he omit to do so, the law by an implication from his duty, creates an obligation on his part to pay for all necessaries which the wife purchases for herself. This liability of the husband is generally treated as growing out of his implied assent, but it would seem more properly to stand upon the ground, that it is a direct right on her part created by the marital relation. At all events, the general rules of agency do not apply to these cases, for the husband cannot avoid his liability for necessaries furnished to his wife during cohabitation, by a general prohibition to all persons, or even by a special prohibition to an individual tradesman, from contracting there-

¹ *Montague v. Espinasse*, 1 Car. & Payne, 357; *Montague v. Benedict*, 3 Barn. & Cres. 635; *Atkins v. Curwood*, 7 Car. & Payne, 760; *Seaton v. Benedict*, 5 Bing. 30; *Norton v. Emmett*, 8 Car. & Payne, 510; *Spreadbury v. Chapman*, 8 Car. & Payne, 371; *Mizen v. Pick*, 3 Mees. & Welsb. 481; *Rumney v. Keyes*, 7 N. Hamp. 571.

for with his wife.¹ *A fortiori*, the mere fact of his ignorance would be of no protection to him against such contract. Nor does the fact that the tradesman credits only the wife, make any difference, for even although he should not know she was married, the husband would be bound.² So, also, although the husband be a lunatic and confined in an asylum, his wife has still authority to pledge his credit for necessities supplied to her, which is avowedly an obligation not growing out of assent.³

§ 97 *b*. The responsibilities of a husband are not solely those of contract; they stand upon a higher ground, for marriage is not simply a contract, but a civil and religious *status*, carrying with it obligations and duties of a peculiar character. An agreement to marry is purely a contract, but it was reserved for Protestantism and the common law to treat the marriage itself as a contract, and the relations and duties of husband and wife as founded solely upon contract. In the Roman Catholic church, it is considered as a religious vow and is viewed as a sacrament. Were it only a contract, a breach of it, by either party, would entitle the other to treat it as null, and to avoid all obligations arising therefrom,—and by mutual agreement the bond of matrimony might, at any time, be loosed. But neither by the common or statute law of England or America, are these common incidents of contracts recognized as belonging to the relation of marriage. Divorce in England must be by act of parliament, and in America, although more freely admitted than in England and for a greater variety of causes, it requires a judicial decree.⁴ The doctrines relating to marriage,

¹ Bentley *v.* Griffin, 5 Taunt. R. 356; Rotch *v.* Miles, 2 Conn. R. 638; Emery *v.* Neighbour, 2 Halst. R. 142; Dixon *v.* Hurrell, 8 Car. & Payne, 717.

² Cunningham *v.* Irwin, 7 Serg. & Rawle, 247; Furlong *v.* Hysom, 35 Maine R. 332.

³ Reed *v.* Legard, 4 Eng. Law & Eq. R. 528.

⁴ The same view is taken by Mr. Bishop in his admirable work on Marriage and Divorce, (§ 29 to § 44,) to which we would refer the reader for a thorough

as thus generally stated by Baron Alderson, in a late case, evidently do not stand solely on the ground of contract:¹ "By the marriage contract entered into by the parties when in their sound senses, the husband contracts a relation which gives certain rights to the wife, and it is sufficient for us to say, that one of them is, that she is entitled to be supported according to the estate and condition of her husband. If, through the omission or misconduct of her husband, she is compelled to procure the necessary articles for herself,—as for instance, where he drives her out of his house, or brings improper persons into his house, so that any respectable woman must leave it, he does, according to the cases, give her authority to pledge his credit to her necessary sustenance elsewhere, that is, he has given her such authority by force of the original relation between husband and wife. So, where he omits to furnish her with necessaries while living with him, she may procure them elsewhere, as otherwise she might perish. Here the husband being a lunatic, and by God's visitation, unable to provide her with necessaries, she surely must be considered as in a situation where a neighbor may furnish her with them; and then, as by the relation which he has originally contracted, the husband should have provided her with them himself, he becomes liable to the person who does it for him."

§ 97 c. Considering the liability of the husband as one growing out of the marital relation, the limits of his liability are evident. Whenever he has performed that duty, he is legally absolved from other responsibilities. Where, therefore, he pays his wife an adequate allowance to enable her to furnish herself with necessaries,²—or wherever he actually furnishes

and enlightened discussion of the question, and a full citation of the authorities bearing upon it.

¹ *Reed v. Legard*, 4 Eng. Law & Eq. R. 528.

² *Kimball v. Keyes*, 11 Wend. R. 33; *Mott v. Comstock*, 8 Wend. R. 544; *Baker v. Barney*, 8 Johns. R. 72; *Cany v. Patton*, 2 Ashmead, R. 140.

sufficient “necessaries”¹ to her, — or wherever she violates her duties as wife, by abandoning him without cause,² or by eloping with an adulterer, — he is, as we shall see, entirely absolved from his liability on her contracts, even for “necessaries.”

§ 97 *d.* The husband is however, at *law*, only liable for necessaries, and not for money lent the wife without his knowledge.³ Yet in *equity*, if the circumstances be such as would render the husband liable for the necessaries purchased therewith, he will be liable for money borrowed for such purpose, provided it be so applied, and not otherwise.⁴

§ 98. In law, the term “necessaries” is understood to mean not only articles which are of absolute necessity, but also such things as are suitable to the fortune and condition of the person to whom they are supplied.⁵ But it is not sufficient, that the articles be of a proper kind and quality; they must also be of a proper quantity, and not be excessive in number and amount.⁶ If the wife be already abundantly supplied, additional goods, though of a proper kind and quality, would not be considered “necessaries.”⁷ It becomes, therefore, the

¹ *Ibid.*

² *Hunter v. Boucher*, 3 Pick. R. 289; post, § 104.

³ *Stone v. Macnair*, 1 Moore, R. 126; *Marlow v. Pitfeild*, 1 P. Wms. R. 958; *Stephenson v. Hardy*, 3 Wilson, R. 388; *Walker v. Simpson*, 7 Watts & Serg. 83; *Greendell v. Godmond*, 5 Adolph. & Ell. 755; *Earle v. Peale*, 1 Salk. R. 387; *Darby v. Boucher*, 1 Salk. R. 279.

⁴ *Earle v. Peale*, 1 Salk. R. 387; *Harris v. Lee*, 1 P. Wms. R. 482; *Marlow v. Pitfeild*, 1 P. Wms. R. 558; *May v. Skey*, 16 Sim. R. 588; *West v. Wheeler*, 2 Car. & Kir. 714.

⁵ *Seaton v. Benedict*, 5 Bing. R. 28; s. c. 2 Moore & Payne, 66; *Montague v. Benedict*, 3 Barn. & Cres. 533, 638; s. c. 5 Dowl. & Ryl. 532.

⁶ *Seaton v. Benedict*, 5 Bing. R. 28; s. c. 2 Moore & Payne, 66; *Atkins v. Curwood*, 7 Car. & Payne, 756; *Freestone v. Butcher*, 9 Car. & Payne, 643. See *Furlong v. Hysom*, 35 Maine R. 333.

⁷ *Renaux v. Teakle*, 20 Eng. Law & Eq. R. 345.

duty of a tradesman not only to ascertain whether the goods he furnishes be suitable to the condition and rank of the wife, but whether she be already sufficiently provided with such goods.¹

§ 98 *a*. Necessary medical advice and attendance are within the rule,² and also the funeral expenses of the wife, so that the husband, if he neglect to provide them, is liable to any one volunteering to perform such reasonable duty.³ But fees of counsel and attorneys furnished to the wife on a bill for divorce, or charged in defending her against a libel of divorce by the husband, are not considered as necessities.⁴

¹ *Montague v. Benedict*, 3 Barn. & Cres. 633, 638. There is a pleasant passage in the opinion of Mr. Justice Hyde dissenting from the judgment of the court in *Manby v. Scott*, 1 Sid. 109, reported in 1 Mod. R. 128, which I cannot refrain from giving place here, that the student, weary with knitting his brows over the dry text, may here relax into a smile at the judge's quaint representation of a wife's occupations. "Admit that in truth the wife wants necessary apparel, woollen and linen, and thereupon she goes into *Paternoster Row*, to a mercer, and takes up stuff, and makes a contract for necessary clothes; thence goes into *Cheapside*, and takes up linen there in like manner: and also goes into a third street, and fits herself with ribbons, and other necessities suitable to her occasions, and her husband's degree. This done, she goes away, disposes of the commodities to furnish herself with money to go abroad to *Hyde Park*, to score at *gleeke*, or the like. Next morning this good woman goes abroad into some other part of *London*, makes her necessity and want of apparel known, and takes more wares upon trust, as she had done the day before; after the same manner she goes to a third and fourth place, and makes new contracts for fresh wares, none of these tradesmen knowing or imagining she was formerly furnished by the other, and each of them seeing and believing her to have great need of the commodities sold her; shall not the husband be chargeable and liable to pay every one of these, if the contract of the wife doth bind him?"

² *Wood v. O'Kelley*, 8 Cush. R. 406. But the dreams and revelations or visions of a person in a mesmeric sleep are held in this case not to be necessities.

³ *Ambrose v. Kerrison*, 4 Eng. Law & Eq. R. 361; *Jenkins v. Tucker*, 1 H. Black. R. 90.

⁴ *Coffin v. Dunham*, 8 Cush. R. 404; *Wing v. Hurlbut*, 15 Verm. R. 607; *Shelton v. Pendleton*, 18 Conn. R. 417. See post, § 106 *a*.

§ 98 *b*. Where a married woman, living with her husband, carries on trade, his liability in her contracts and debts, in relation to the trade, is one purely of agency or partnership, and depends upon his assent and authorization. If he share in the profits, or they are applied to the maintenance of the family, the law implies an authority by the wife to bind him in all necessary acts in the business.¹ So, also, her authority to draw or indorse bills, sign notes, and make purchases, would be implied, whenever it necessarily belonged to the business, or whenever it can be shown that it was her habit to do such acts, and that her husband had constantly assented thereto.² But her authority to draw a bill or note cannot be inferred from the mere fact, that she was known to the husband to be engaged in carrying on business, and that the note was given in the course of such business; and such a note would not be available against the husband even in the hands of a *bonâ fide* indorsee,³ without circumstances showing authorization by him. Wherever notes or bills are drawn by a wife, she acts as the agent of the husband, and the note or bill should exhibit her agency — otherwise as in all other cases of agency, she alone would be bound, and her liability is nothing alone.⁴ The husband might, however, by subsequently assenting to a bill accepted by his wife, and render himself personally liable.⁵

§ 99. In the next place, as to the liability of the husband, where the articles supplied to the wife are not necessities. Here there is no legal obligation growing out of the marital relation, as in the case of “necessaries,” — and the contracts of the wife bind the husband only on the ground of her im-

¹ *Petty v. Anderson*, 2 Car. & Payne, 38; *Clifford v. Burton*, 1 Bing. R. 199. But see *Smallpiece v. Dawes*, 7 Car. & Payne, 40.

² *Prestwick v. Marshall*, 7 Bing. R. 565; *Cotes v. Davis*, 1 Campb. R. 485; *Barlow v. Bishop*, 1 East, R. 432.

³ *Reakert v. Sandford*, 5 Watts & Serg. 164.

⁴ *Minard v. Mead*, 7 Wend. R. 68.

⁵ *Lindus v. Bradwell*, 5 C. B. 583.

plied authority as his agent. And in such case, the presumption of law is, that the husband did not authorize or assent to her contract. It becomes, therefore, incumbent on the tradesman supplying a married woman with articles, which are not necessities, to assure himself that she is authorized thereto by her husband, since, in an action for their price, he will be obliged to prove affirmatively, that the debt was contracted on the express or implied authority of the husband.¹ And it is not for the husband to prove that he has given notice to the tradesman not to trust his wife, but for the tradesman to show a state of facts, which unequivocally imply that he authorized her to make the contract, or assented to it afterwards.² Nor does it make any difference in this respect, that the tradesman is deceived, by the false appearance assumed by her, into a belief that she had authority to buy, or that the goods were in the class of necessities, if by cautious inquiries he might have ascertained her real condition; for if the goods be not actually necessities, and the husband have not authorized the purchase, he is not liable, although the tradesman was deceived.³ It is, however, the office of a jury to decide from the facts of each case, whether they indicate an assent by the husband to the contract of the wife.⁴

§ 100. There are, however, certain presumptions of his assent, which arise in law; as, for instance, in cases where

¹ *Montague v. Benedict*, 3 Barn. & Cres. 636; *Atkins v. Curwood*, 7 Car. & Payne, 760; *Montague v. Espinasse*, 1 Car. & Payne, 357; *Waithman v. Wakefield*, 1 Camp. R. 120; *Reed v. Teakle*, 24 Eng. Law & Eq. R. 332.

² *Spreadbury v. Chapman*, 8 Car. & Payne, 371; *Mizen v. Pick*, 3 Mees. & Welsb. 481; *Atkins v. Curwood*, 7 Car. & Payne, 756; *Barnes v. Jarrett*, 2 Jur. 998; *Reakert v. Sanford*, 5 Watts & Serg. 164.

³ *Waithman v. Wakefield*, 1 Camp. R. 120; *Atkins v. Curwood*, 7 Car. & Payne, 756; *Wilson v. Burr*, 25 Wend. R. 386.

⁴ *Montague v. Benedict*, 3 Barn. & Cres. 635; *Smallpiece v. Dawes*, 7 Car. & Payne, 40; *Bentley v. Griffin*, 5 Taunt. R. 356; *Holt v. Brien*, 4 Barn. & Ald. 255; *Manby v. Scott*, 1 Sid. R. 121; *Freestone v. Butcher*, 9 Car. & Payne, 643.

orders are given by her in those departments of her husband's household, which are under her superintendence; provided such orders be not excessive or extravagant in kind or quantity.¹ Again, the fact, that the husband sees the wife use and wear articles which are not "necessaries," and which he knows that she has bought, without disapprobation, creates a strong presumption of his assent; although if he should express his disapprobation, and *a fortiori*, if he should have refused to pay for similar articles before, it would be otherwise.² Again, the same presumption of assent arises as to goods, which the husband *permits* her to receive at the house, knowing that they are purchased by her, while they are living together,³ — and as to her contracts for the hire of servants.⁴ These presumptions, however, may be rebutted, — as, for instance, by proof that the wife has a separate income, in which case the knowledge of the husband that she had bought certain goods, and his permitting her to use or wear them, without expressing any disapprobation, would afford no indication of his assent to become personally liable therefor, since he may fairly suppose them to be purchased out of her own funds.⁵ In all such cases, however, his safest course is to return the articles to the tradesman when he can do so.⁶

§ 101. Cohabitation furnishes also a strong presumption of the assent of the husband, where the articles supplied are not necessaries. This affords, however, merely a presumption, which may be rebutted by proof of the contrary.⁷ Thus, if the evidence show that credit was given solely to the wife, or that

¹ Ibid. *Freestone v. Butcher*, 9 Car. & Payne, 643.

² *Atkyns v. Curwood*, 7 Car. & Payne, 756.

³ *Waithman v. Wakefield*, 1 Camp. R. 120; *Emmett v. Norton*, 8 Car. & Payne, 506; *Freestone v. Butcher*, 9 Car. & Payne, 643.

⁴ *White v. Cuyler*, 1 Esp. R. 200; s. c. 6 T. R. 176.

⁵ *Freestone v. Butcher*, 9 Car. & Payne, 643.

⁶ *Wakeman v. Waithfield*, 1 Camp. R. 120.

⁷ *Montague v. Benedict*, 3 Barn. & Cres. 635; *Watson v. Threlkeld*, 2 Esp.

her husband was wholly ignorant of the contract, or expressly forbade the tradesman to trust his wife, the presumption fails, and he will be absolved from liability.¹ But so strong is the presumption of the assent of the husband to the wife's contract, created by cohabitation, that it has been decided, that if a man cohabit with a woman, holding her out to be his wife, he is liable for goods furnished to her during their cohabitation by a tradesman, who knew that they were not married.² *A fortiori*, this would be the case, if the tradesman suppose them to be married. Yet, if the pretended husband go abroad and leave the woman he holds out as his wife at his residence, he would be liable to tradesmen for necessities supplied to her during his absence in like manner as if she had actually been his wife; but after his death his executor would be absolved.³ Yet if the tradesman knew their intercourse to be adulterous, the ostensible husband would not be liable, without an express promise or authorization to him or his agent.⁴ After their separation, however, he would not be liable for necessities furnished to her, unless she were actually his wife, or unless he continued to hold her out as such, either expressly or impliedly, by allowing her to remain in his house.⁵

R. 637; *Robinson v. Nahon*, 1 Camp. R. 245; *Connerat v. Goldsmith*, 6 T. R. Cobb, Georgia R. 14; *Blades v. Free*, 9 Barn. & Cres. 169; *Clifford v. Latton*, 3 Car. & Payne, 15.

¹ *Bentley v. Griffin*, 5 Taunt. 356; *Taylor v. Brittan*, 1 Car. & Payne, 16, note; *Metcalf v. Shaw*, 3 Camp. R. 22; *Holt v. Brien*, 4 Barn. & Ald. 255; *Etherington v. Parrott*, Lord Raym. 1006; s. c. 1 Salk. 118; *Petty v. Anderson*, 2 Car. & Payne, 38; s. c. 3 Bing. R. 170; *Bolton v. Prentice*, Strange, R. 1214; *Hardie v. Grant*, 8 Car. & Payne, 512; *Spreadbury v. Chapman*, 8 Car. & Payne, 372.

² *Robinson v. Nahon*, 1 Camp. 246; *Watson v. Threlkeld*, 2 Esp. N. P. C. 637; *Ryan v. Sames*, 12 Q. B. 460; *Mace v. Cammel*, Lofft, 782; *Munroe v. De Chemant*, 4 Camp. 215; *Blades v. Free*, 9 B. & C. 167; *Etherington v. Parrott*, 1 Salk. 118, and Evans's note; *Norwood v. Stevenson*, Bull. N. P. 136; *Hudson v. Brent*, cited 1 Bos. & Pul. 338.

³ *Blades v. Free*, 9 Barn. & Cres. 167.

⁴ *Norton v. Fazan*, 1 Bos. & Pul. 226; *Blades v. Free*, 9 Barn. & Cres. 167.

⁵ *Munroe v. De Chemant*, 4 Camp. 215; *Ryan v. Sams*, 12 Q. B. 460. In

§ 101 *a.* So, also, although the wife have been guilty of adultery, yet if the husband still continue to cohabit with her he is liable for necessaries;¹ for cohabitation after knowledge of adultery is a condonation of the offence.² And if the husband, after his wife has left him adulterously, receive her back, he becomes again liable on her contracts for necessaries.³

§ 102. Where the wife has been accustomed to purchase articles of a particular tradesman, whether they be necessaries or not, and the husband has paid for them without objection, it will be considered as sufficient evidence of an assent to her

this case, the defendant and Mrs. S., his mistress, lived together for years as husband and wife, and occupied three houses successively; at each time of their coming into a house the plaintiff was employed to do work and furnish materials, Mrs. S. as well as the defendant giving directions, and the defendant sanctioned her orders and paid the bills. The plaintiff knew that she was the defendant's mistress. While residing in the third house they separated; but Mrs. S., without the defendant's sanction, sent for the plaintiff to the house which she had not yet left, and ordered fittings up for a new house of her own. It was held, in an action for the last-mentioned goods, that it was a proper question for the jury, whether or not the defendant had given the plaintiff reason to believe that Mrs. S. continued to be his agent, and that on their finding the affirmative, the defendant was liable. Lord Denman, C. J., said: "In *Munroe v. De Chemant*, 4 Camp. 215, it may be presumed that the parties had lived long separate; and it is consistent with the statement there that Lord Ellenborough may have noticed that circumstance as important if the parties were not married, but told the jury, 'if you think they are proved to have been man and wife, the case will be different.' And the order there seems to have commenced a new account. Here the defendant sanctions orders to the plaintiff in the name of Stanley while the person in question is living with him under that name; and she afterwards gives orders to the plaintiff in the same name, circumstances apparently continuing unaltered. It would be unreasonable to expect more evidence in such a case."

¹ *Norton v. Fazan*, 1 Bos. & Pul. 226; *Harris v. Morris*, 4 Esp. R. 41; *Watson v. Threlkeld*, 2 Esp. R. 637; *Blades v. Free*, 9 Barn. & Cres. 167; *Robinson v. Gosnold*, 6 Mod. R. 171.

² *Quincy v. Quincy*, 10 New Hamp. R. 272; *Hall v. Hall*, 4 New Hamp. R. 462.

³ *Harris v. Morris*, 4 Esp. R. 41. See also *Renwick v. Ficklin*, 3 B. Munroe, R. 166.

purchasing similar articles from him in future.¹ And, in such a case, if the husband would avoid all liability on such contracts, he must give notice to the tradesman not to supply his wife with such goods in future, and then he will not be liable, if the tradesman do not observe the prohibition.² And a notice to the servant of the tradesman is, in this respect, considered as equivalent to a notice to the tradesman himself.³ Yet if the prohibition be not brought home to the knowledge of either the tradesman, or his agent, or his servant, it will not bind him.⁴

§ 103. If credit be given solely to the wife, the husband is not liable, although they live together, and although he see her in possession of the goods bought.⁵ If, therefore, the tradesman should take her promissory note in payment, which would plainly indicate a reliance on her personal credit, the husband would not be liable for the price of the goods, nor on the note, nor need he prove that the goods were not "necessaries."⁶ The question whether credit were given to the wife, is, however, generally a question of fact for the jury.⁷

§ 104. Having now considered the responsibility of the husband on the wife's contract, while they live together, it remains for us to consider his liability in case of a separation from his wife. And, in the first place, where a separation has ensued

¹ *Filmer v. Lynn*, 4 Nev. & Man. 559; s. c. 1 Har. & W. 59.

² *Etherington v. Parrott*, 1 Salk. R. 118; s. c. Lord Raym. 1006; *Bolton v. Prentice*, Strange, R. 1214; *Hardie v. Grant*, 8 Car. & Payne, 512.

³ *Ibid.*

⁴ *Manby v. Scott*, 1 Sid. 127; *Todd v. Stokes*, Lord Raym. 444; *Montague v. Benedict*, 3 Barn. & Cres. 635; *Child v. Hardyman*, Strange, R. 875; *Lungworthy v. Hockmore*, Lord Raym. 445, *n.*

⁵ *Bentley v. Griffin*, 5 Taunt. R. 356; *Taylor v. Brittan*, 1 Car. & Payne, 14, *n.*; *Dixon v. Hurrell*, 8 Car. & Payne, 817; *Ante*, § 100.

⁶ *Metcalfe v. Shawe*, 3 Camp. R. 22.

⁷ *Ibid.* *Harvey v. Norton*, 4 Jur. R. 42; *Bentley v. Griffin*, 5 Taunt. R. 356.

in consequence of the *adultery* of the wife, whether it be by a decree of divorce, or by the voluntary elopement of the wife, or by expulsion from the house of the husband, he is not responsible, even for the necessaries of life furnished to her.¹ The law will not only not force a husband to support an adulterous wife, but it will not allow her to receive dower. Nor is it necessary in such cases to give notice not to trust the wife, if the fact that the wife and husband live permanently separate be known, inasmuch as it is considered the duty of the tradesman to make inquiries, before he trusts a woman under such circumstances.² Indeed, the presumption is against the husband's liability when he lives apart from his wife, and if a tradesman supply her under such circumstances, the burden of proof is on him to show the liability of the husband.³

§ 105. But if the wife have lately left the husband, and the fact of their separation be not notorious, and not in fact known to the tradesman, a general notice would seem to be necessary to absolve the husband.⁴ But if the husband allow the wife to remain in his house, and live with her after she has been guilty of adultery, he is liable for necessaries supplied to her.⁵ Nor would he be absolved from liability by afterwards

¹ Hetherington *v.* Graham, 6 Bing. 135; Hunt *v.* De Blaquiere, 5 Bing. 562; Hardie *v.* Grant, 8 Car. & Payne, 512; Emmett *v.* Norton, 8 C. & P. 506; Govier *v.* Hancock, 6 T. R. 603; Norton *v.* Fazan, 1 Bos. & Pul. 226; Ozard *v.* Darnford, Selw. N. P. 221; Hunt *v.* De Blaquiere, 5 Bing. 561; Bird *v.* Jones, 3 M. & Ry. 121; Cox *v.* Kitchin, 1 Bos. & Pul. 338; Hunter *v.* Boucher, 3 Pick. R. 289.

² Todd *v.* Stokes, Lord Raym. 444, 445; Hinton *v.* Hudson, Freem. R. 248.

³ Clifford *v.* Laton, 3 Car. & Payne, 16; Mainwaring *v.* Leslie, 2 Car. & Payne, 507; Bird *v.* Jones, 3 Man. & Ryl. 121; Edwards *v.* Towels, 5 Mann. & Gray, 624; Hindley *v.* Westmeath, 6 Barn. & Cres. 200; Blowers *v.* Sturtevant, 4 Denio, R. 46; Walker *v.* Simpson, 7 Watts & Serg. 83; Cary *v.* Patton, 2 Ashm. R. 40. But see Rumney *v.* Keyes, 7 New Hamp. R. 571; Frost *v.* Willis, 13 Verm. R. 202.

⁴ Todd *v.* Stokes, Lord Raym. 444, 445; Hinton *v.* Hudson, Freem. R. 248.

⁵ Houlston *v.* Smyth, 3 Bing. R. 130.

leaving the house for such cause, and abandoning her, unless the circumstances under which it is done be equivalent to notice to the public, that he leaves her because of her adultery. Thus, where a husband, on account of the adultery of his wife, left her with his two children in his house, without making any provision for her, and she continued to live there in adultery, it was held, that the husband was liable to the tradesman for necessities supplied to her, unless the tradesman knew or ought to have known the circumstances under which she was living.¹ Where the wife and husband have separated on account of the adultery of the wife, she does not acquire the character of a *feme sole*,* although her husband be not liable for her debts, and although there be no divorce; and being a *feme covert*, the tradesman who supplies her even with necessities, does so at his own risk, and cannot recover their value from her.² He has no security, therefore, but to exact payment on the spot for all he sells her.

¹ Norton v. Fazan, 1 Bos. & Pul. 226. In this case Chief Justice Eyre said: "If the defendant in another action brought against him by some other tradesman, shall be able to establish the notoriety of his wife's situation, he may defend himself. But as the case stands at present, this woman appears to have been living in a house in which she was placed by the defendant himself, together with two children bearing the husband's name, both of whom were born in wedlock. It is true that she had an adulterous intercourse with another man, but that was not proved to be known to this tradesman. If the defendant can bring it home to any other tradesman who shall be in the same situation as the present plaintiff, that he did know or ought to have known the circumstances under which the wife was living, the defendant may perhaps be able to prevent another verdict passing against him." Rawlins v. Vandyke, 3 Esp. R. 250.

² Hatchett v. Baddeley, 2 W. Black. R. 1081. In this case, Blackstone, J., says: "It seems to be supposed, by the argument, that if the husband is not bound to pay this debt, it follows, that the wife may be compelled alone. But this is no legal consequence. I think, in the present case, that it cannot be recovered of either. And I see no hardship in a man's losing his money, that avows upon the record, that he furnished a coach to the wife of a player, whom he knew to have run away from her husband. If this were universally known to be law, it would be difficult for such woman to gain credit;

§ 105 *a*. When the separation is by *act of law*, as by a decree of divorce *a mensâ et thoro*, the responsibility of the husband is governed by the terms and conditions of the decree. If the court refuse her alimony, (as in cases of adultery in England,) she cannot bind the husband for necessities, under any circumstances. If the court award her a certain sum as alimony, she has no power to bind him so long as that sum is paid, however insufficient it may be, in point of fact, to enable her to procure the things which are suitable to her rank and position; the award of the court being conclusive on the question of adequacy.¹ Nor will a court of law enforce a contract for necessities against the husband, although the decree awarding the alimony have ceased to be operative, provided it be renewable on application.² Yet if the alimony be not paid, the wife is not bound to sue for the allowance, but the husband is liable in an action by the tradesman.³ So, also, he is liable for necessities provided for his wife pending a suit in the ecclesiastical court, and before alimony is decreed, although a decree afterwards made should direct the alimony to be paid

and this would consequently reduce the number of wanderers. But be this as it may, I am clearly of opinion, that in no case can any *feme covert* be sued alone, except in the known excepted cases of abjuration, exile, and the like; where the husband is considered as dead, and the woman as a widow, or else as divorced *a vinculo*; Co. Litt. 133 *a*." See also the note of Mr. Ellsley to this case, p. 1080; Compton *v.* Collinson, 1 H. Black. R. 150; Hyde *v.* Price, 3 Ves. Jr. 443; Lean *v.* Schutz, 2 W. Black. 1198, and note (*d*); Gilchrist *v.* Brown, 4 T. R. 766; Marshall *v.* Rutton, 8 T. R. 545. The objection to such a doctrine stated in Cox *v.* Kitchin, 1 Bos. & Pul. 339: "How is she to find the means of supporting herself? How is she to procure even a joint of meat for a daily subsistence? &c." are easily enough answered. She can pay for whatever she would purchase on the spot. Credit is not necessary.

¹ Willson *v.* Smyth, 1 Barn. & Adolph. 801; Hunt *v.* De Blaquiére, 5 Bing. R. 550.

² Willson *v.* Smith, 1 Barn. & Adolph. 801.

³ Hunt *v.* De Blaquiére, 5 Bing. R. 550; Keegan *v.* Smith, 5 Barn. & Cres. 118; Willson *v.* Smyth, 1 Barn. & Adolph. 801; Lewis *v.* Leigh, 2 Barn. & Cres. 291; Baker *v.* Barney, 8 Johns. R. 72.

from a date before the time when the necessities were provided.¹ So, also, if the separation arises from the lunacy of the husband, and he is confined in an asylum, he is nevertheless liable for the wife's support in the mean time.²

§ 106. Where the separation between the two parties is not by act of law, but is *by deed*, or by *mutual agreement* without deed, the wife cannot contract so as to bind the husband, provided he allow her an ample and separate maintenance.³ And if the tradesman supply her even with necessities on credit, he has no legal claim upon her, since she, being a *feme covert*, cannot be separately liable. Nor has he any legal claim therefor against the husband, since the latter is not liable for necessities supplied to her during such separation, if the fund which he allots to her be sufficient for her support and duly paid. The allowance being made by the husband and not by the court, a different rule prevails in the two cases; and in order to avoid her contract for necessities, it is incumbent on the husband to show, that the allowance is adequate under the circumstances, and that it has been actually paid. Nor will the wife's mere acquiescence prove its adequacy.⁴ But if she have an adequate sum allowed to her for her maintenance, it would not matter whether it were paid by the husband or by any other person.⁵ In either such case, whoever

¹ Keegan v. Smith, 5 Barn. & Cres. 375.

² Read v. Legard, 4 Eng. Law and Eq. R. 523; Shaw v. Thompson, 16 Pick. R. 198.

³ Marshall v. Rutton, 8 T. R. 545; Hodgkinson v. Fletcher, 4 Camp. 70; Emmett v. Norton, 8 Car. & Payne, 506; Marshall v. Rutton, 8 T. R. 545; Corbett v. Poelnitz, 1 T. R. 6; Willson v. Smyth, 1 B. & Ad. 803; Ellah v. Leigh, 5 T. R. 679; Chambers v. Donaldson, 9 East, R. 471; Lewis v. Leigh, 3 Barn. & Cres. 291. See the able case of Cany v. Patton, 2 Ashm. 140, where this subject is treated with great acuteness.

⁴ Nurse v. Craig, 2 N. Rep. 148; Hodgkinson v. Fletcher, 4 Camp. 70; Baker v. Barney, 8 Johns. 27; Holt v. Brien, 4 B. & Ald. 252; Willson v. Smyth, 1 Barn. & Ald. 801; Dennys v. Sargeant, 6 Car. & Payne, 419.

⁵ Clifford v. Laton, Mood. & Malk. 102.

trusts her, trusts entirely to her honor,¹ unless he had been accustomed to trust her before, and was not aware of the separation, it not having become a matter of notoriety.² But, although it is incumbent upon the husband to prove the adequacy of the allowance and the due payment of it,³ because such proof is requisite to rebut the presumption of his liability for "necessaries" furnished to his wife; yet it is not necessary for him to give notice of the allowance to the tradesman, in order to absolve himself from liability.⁴ Whether the allowance be sufficient is a question for the jury solely.⁵

§ 106 *a*. There is, however, one exception to the rule, that the husband is not liable for the wife's debts during their separation, provided there be a sufficient allowance granted her; which obtains in cases where she incurs expenses for the purpose of protecting herself, by articles of peace, against his violence, for this is a diminution of her allowance by misconduct on his part, which ought to enure to his benefit.⁶ But he would not be liable to pay the bill of an attorney whom she employs to procure an indictment of him,⁷—nor would he be liable to an attorney for professional services rendered to the wife, in forwarding a petition of divorce against him, nor in defending a petition for divorce instituted by him against her

¹ *Todd v. Stokes*, Lord Raym. 444; *Nurse v. Craig*, 2 New R. 148.

² *Todd v. Stokes*, 1 Lord Raym. 444; *Cany v. Patton*, 2 Ashm. R. 140.

³ *Hodgkinson v. Fletcher*, 4 Camp. 70; *Nurse v. Craig*, 2 New R. 148; *Chitty on Cont.* 173.

⁴ *Mizen v. Pick*, 3 Mees. & Welbs. 481; *Turner v. Winter*, Selw. N. P. 262. See also *Clifford v. Laton*, Mood. & Malk. 102.

⁵ *Hopkinson v. Fletcher*, 4 Camp. R. 70; *Emmett v. Morton*, 8 Car. & Payne, 506; *Pidgin v. Cram*, 8 N. Hamp. 350; *Atkins v. Curwood*, 7 Car. & Payne, 756; *Ewers v. Hutton*, 3 Esp. 255; *Marshall v. Rutton*, 8 T. R. 545.

⁶ *Turner v. Rookes*, 10 Adolph. & Ell. 47.

⁷ *Grindell v. Godmond*, 5 Adolph. & Ell. 755; *Ladd v. Lynn*, 2 Mees. & Welsb. 265.

for her fault.¹ Nor would he be responsible for the counter-part of the deed of separation procured by the wife's trustee, except upon his express promise.²

§ 106 *b*. So, also, there is an exception to the rule, that a married woman is not personally responsible for her debts, which obtains in cases where a married woman lives separate from her husband, and by fraudulently representing herself to be a *feme sole*, obtains credit for goods supplied to her, for she thereby renders herself personally liable by virtue of her fraud.³ This exception applies not only to cases, where there has been a separation by divorce or mutual agreement, but to cases where the husband is residing abroad.⁴

§ 107. A husband is not, however, bound for necessaries furnished to his wife, if she have left his house voluntarily without sufficient cause, although she do not go away with an adulterer or in an adulterous manner.⁵ But if he turn her out of doors without sufficient cause,⁶ or if she leave him, because of ill treat-

¹ Coffin *v.* Dunham, 8 Cush. R. 44; Wing *v.* Hurlburt, 15 Verm. R. 607; Shelton *v.* Pendleton, 18 Conn. R. 417; Shepherd *v.* Mackoul, 3 Camp. R. 326; Dorsey *v.* Goodenow, Wright, R. 120. Nor would the wife herself be liable unless by express promise after the divorce. Wilson *v.* Burr, 25 Wend. R. 386. See Williams *v.* Fowler, 1 McClel. & Younge, 269.

² Ladd *v.* Lynn, 2 Mees. & Welsb. 265.

³ Cox *v.* Kitchen, 1 Bos. & Pul. 338; Collins *v.* Rowed, 1 Bos. & Pul. N. R. 54.

⁴ De Gaillon *v.* L'Aigle, 1 Bos. & Pul. 357.

⁵ Harwood *v.* Heffer, 3 Taunt. 421; Child *v.* Hardyman, Str. 875; Hindley *v.* The Marquis of Westmeath, 6 Barn. & Cres. 200; Mainwaring *v.* Leslie, 2 Car. & Payne, 507; M'Cutchen *v.* M'Gahay, 11 Johns. R. 281; Walker *v.* Simpson, 7 Watts & Serg. 83; Brown *v.* Patton, 3 Humph. R. 135; Cany *v.* Patton, 2 Ashm. R. 140.

⁶ Thompson *v.* Hervey, 4 Burr. 2177; Montague *v.* Benedict, 3 B. & C. 635; Lungworthy *v.* Hockmore, Lord Raym. R. 444; Etherington *v.* Parrott, Lord Raym. R. 1086; s. c. Salk. R. 118; Hodges *v.* Hodges, 1 Esp. R. 441.

ment,¹ or because he has brought a prostitute into the house to live with him as his mistress,² or for any other adequate reason,

¹ "When a wife's situation in her husband's house," said Lord Kenyon in *Hodges v. Hodges*, 1 Esp. R. 441, "is rendered unsafe from his cruelty and ill treatment, I shall rule it to be equivalent to his turning her out of the house, and that the husband shall be liable for necessaries furnished to her under these circumstances."

² *Corbett v. Poelnitz*, 1 T. R. 5. In *Horwood v. Heffer*, 3 Taunt. R. 421, it was held, that the fact that the husband kept a courtesan under his roof was not a sufficient cause to justify the wife in abandoning him. But in *Houlston v. Smyth*, 3 Bing. R. 129, this case is severely reprobated. In this latter case, Best, C. J., said: "There is not the least pretence for this motion; the only ground on which a new trial can be asked for is a supposed misdirection on my part. I told the jury that if they were of opinion the defendant's wife had reasonable ground to apprehend personal violence, she was justified in leaving her husband; that the man who received and supported her under such circumstances acted like a Christian, and in a Christian country was entitled to compensation. I am still of that opinion, and it is warranted even by the case of *Horwood v. Heffer*; for Lawrence, J., says, 'You did not state any apprehension of her personal safety;' from which it may be inferred that if evidence had been adduced of such apprehension, the decision of the court would have been the other way. But a woman is not bound to wait till actual violence is committed, and if she has reasonable ground for apprehending danger, may fly from the presence of her husband. It has been objected, that the establishment of this principle may lead fanciful women to quit their homes without sufficient reason. The apprehension, however, is not to be merely such as a fanciful woman may entertain, but such as a jury shall esteem to have been felt upon reasonable grounds. It was put to the jury in the present case whether *they* thought the woman had reasonable ground for apprehending violence. The jury were warranted in concluding she apprehended a repetition of the violence offered to her the year preceding; and more horrid treatment no female had ever experienced. If I had recollected the case decided by Lord Ellenborough, I should have decided, even at Nisi Prius, against the case of *Horwood v. Heffer*. The doctrine in that case cannot be law. Is a decent woman to stay under the same roof with a prostitute? to sit at the same table with her? or to give place and receive her meals in a separate apartment? The law can never require a woman to act contrary to decency:—If a wife remains in the house with her husband and an adulteress, I doubt whether she could afterwards obtain a divorce for the adultery of her husband; her continuance in the house with her husband under such circumstances, might be considered as an assent to his conduct, and prejudice her case in the spiritual court." Mr. Justice Park said, "there is no ground

he will be liable,¹ although notice be given that she is not to be trusted. But when she leaves him on account of difficulties and disagreement in the family, it must clearly appear that they arose from his misconduct, or he will not be responsible on her contracts.² (If the wife voluntarily elope, and not with an adulterer, and afterwards solicit her husband to receive her again, and he refuse, he will be bound from that time for necessities furnished to her.³) Yet if such an elopement be with an adulterer, it would be otherwise.⁴ If, however, the husband receive his wife again, after she has been turned away by him for adultery, and then turn her away again, he is liable for necessities furnished to her.⁵

§ 108. In case a husband has obliged his wife to leave his house on account of his ill treatment to her, or has turned her

whatever for interfering with the verdict. The direction to the jury was perfectly correct, and the true question was, whether the conduct of the defendant was such as to occasion on the part of his wife a reasonable and strong apprehension of personal violence. From what had passed before, she had a reasonable ground for apprehending such violence, and the jury had drawn the proper conclusion. I am surprised at the language ascribed to the court in *Horwood v. Heffer*, because it is abhorrent from every feeling of a man and a Christian. It is not to be endured that the mistress of a house should confine herself to a chamber with bare necessities, when a prostitute is sitting at the same table with her husband. That cannot be the law of England, because it is not the law of morality and religion." Certainly it seems but just, that if a man may expel his wife from his house for her adultery, she should be entitled to leave the house for his adultery. See *Ham v. Toovey*, Selw. N. P. 246; *Alden v. Chapman*, Selw. N. P. (8th ed.) 272. See also *Sikes v. Halstead*, 1 Sand. S. C. R. 483.

¹ *Houliston v. Smyth*, 3 Bing. 127; *Reed v. Moore*, 5 C. & P. 200; *Emery v. Emery*, 1 Younge & Jerv. 501; *Sikes v. Halstead*, 1 Sandf. Sup. C. R. 483.

² *Blowers v. Sturtevant*, 4 Denio, R. 46.

³ *Ewers v. Hutton*, 3 Esp. 256; *Child v. Hardyman*, Stra. 876, and the cases collected in Str. 1214, n. 1; 1 Bac. Abr. Baron & Feme, H.; *M'Cutchen v. M'Gahay*, 11 Johns. 281; *M'Gahay v. Williams*, 12 Johns. 293; *Clement v. Mattison*, 3 Richardson, R. 93; *Cunningham v. Irwin*, 7 Serg. & Rawle, 247; *Henderson v. Stringer*, 2 Dana, R. 293.

⁴ *Govier v. Hancock*, 6 T. R. 603.

⁵ *Harris v. Morris*, 4 Esp. 41.

out of doors without sufficient cause, the husband would be liable for the reasonable costs of a suit at law or in equity instituted against him in behalf of his wife.¹ And where a husband, separated from his wife, by his violent conduct renders it necessary for her to exhibit articles of the peace against him, he is liable for expenses thereby incurred, although he allow her a separate maintenance.²

§ 109. In cases of fraudulent misrepresentation on the part of the wife of her authority to bind her husband, upon principle, she would be liable in trover for the goods, if they were in her possession, — or for their value, if she had parted with them upon a valuable consideration, which she retained.³ If, however, they had been consumed by her, or she had given them away, or had parted with the proceeds of a sale thereof, the seller would be remediless; upon the ground, that to render her responsible, in such cases, would be to impose the real liability upon the husband, who, not having authorized her purchase, could not be legally bound thereby. Besides, another and stronger reason is to be found in the policy, which throws upon the vendor the risk, in cases where he knowingly sells to a married woman, and which renders it his duty to guard against her deceit, by not implicitly trusting to her representations. If, however, she still retain the goods purchased, or their proceeds, she would, upon principle be liable therefor in trover; upon the ground, that her fraud, which is a tort, annuls the contract, and leaves her in the situation of a person having goods, for which she has paid no consideration, and which do

¹ *Williams v. Fowler, McClell. & Younge*, 269; *Shepherd v. Mackoul*, 3 Camp. R. 326. But see *Shelton v. Pendleton*, 18 Conn. R. 417.

² *Turner v. Rooks*, 10 Adolph. & Ell. 47; s. c. 2 Perry & Dav. 294. See ante, § 106 *a*.

³ *Deerly v. The Duchess of Mazarine*, 2 Salk. R. 646; *Waithman v. Wakefield*, 1 Camp. R. 120. See ante, § 66, and note 1, p. 56. The same rule would seem to apply to married women as to infants, in this respect. *Partridge v. Clarke*, 5 T. R. 194; *Waters v. Smith*, 6 T. R. 451; *Pitt v. Thompson*, 1 East, R. 16; *Wilkins v. Wetherell*, 3 Bos. & Pul. 220; *Pearson v. Meadow*, 2 Black. R. 903; *Luden v. Justice*, 1 Bing. R. 344; s. c. 8 Moore, R. 346.

not belong to her. She could not, of course, be liable in an action of assumpsit, since the form of the action would virtually, and, at least, for the purposes of the trial, affirm the contract, and she could only be rendered personally responsible upon the ground, that there was no contract in existence, because of the fraud; but only a tort. If the action proceed upon the ground of the existence of a contract, the defence, that she is not liable personally on her contracts, would be unanswerable. But if the action affirm a tortious possession of the goods, such a defence would not present an issue in the pleadings.¹

¹ See ante, § 66, note 1, p. 56. In *Fairhurst v. Liverpool Adelphi Loan Association*, 26 Eng. Law & Eq. R. 396, Pollock, C. B., said: "The question in this case is, whether an action will lie against a husband and wife, for a false and fraudulent representation by the wife to the plaintiffs, that she was sole and unmarried, at the time of her signing a promissory note as surety to them for a third person, whereby they were induced to advance a sum of money to that person. We think the action will not lie. A *feme covert* is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband, or herself, for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrong. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture; for there is not a contract of any kind which a *feme covert* could make, whilst she knew her husband to be alive, that could not be treated as a fraud; for every such contract would involve in itself a fraudulent representation of her capacity to contract. Accordingly, it has been held in the case cited, and so much commented upon, during the argument, (*Cooper v. Witham*, reported in 1 Lev. 247,) that the wife could not be bound in such a case. It is true that Twisden, J., assigned another reason, namely, that the wife having represented herself to be sole, and induced the plaintiff to marry her, it was a felony in her, and so no action could lie till the felony was tried; but it was said, that if the wife had been pardoned, by which that objection was removed, yet it seemed the action would not lie, and the reason was that 'the fact sounded in contract.' The case is also reported in 1 Sid. 375, and there one of the rea-

§ 110. A vendor could not, however, retake from a married woman goods obtained from him without a false representation, even although she should still retain them in her possession; because as her possession was acquired by contract, she could not be made responsible thereon, and there being no tort, trover could not be sustained. Besides, it would not, in such a case, be by any means evident, that the seller did not trust to the personal credit of the woman, which he might fairly do; for, although he could not maintain an action against her, personally, for the purchase-money, yet the consideration, on her part, would be good, and sufficient to support the contract, though it would not be valuable.

SLAVES.

§ 111. We shall now consider the contracts of slaves. The condition of slaves in the slave-holding States in this country is analogous to that of slaves among the ancient Greeks and Romans, and not to that of the villeins of feudal times.¹ They are considered in most respects as chattels and not as persons. They can bring no actions and acquire no property by descent or purchase.² They can enforce no promise made to them either in law or equity,³ and notes given to them are void.⁴

sons stated is, that the ground of the action was 'the communication and contract of the wife.'

"In the case of an infant it was held, for a similar reason, that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him, *Johnson v. Pye*, 1 Sid. 258; 1 Keb. 913, and according to the latter report, it was said, that if the action should be maintainable, 'all the pleas of infancy would be taken away, for such affirmations are in every contract.'"

¹ *Bynum v. Bostick*, 4 Dess. 267; Am. Jur. 21, 18.

² *Cunningham's heirs v. Cunningham's executors*, Cam. & Norwood, (N. C.) 356.

³ *Beall v. Joseph, Hardin*, 52. In *Glen v. Hodges*, 9 Johns. 67, it is held that a slave cannot contract a debt.

⁴ *Gregg v. Thompson*, 2 Rep. Const. 60, (S. C.) 331.

§ 112. There are some modifications of these rules of the Roman law, by statute and usage among some of the slaveholding States, but otherwise they generally obtain in this country. A slave may, however, contract with his master respecting his manumission, and the agreement can be enforced by law.¹ But this is the only contract which he can make, he being considered as a thing, and not a person.

SEAMEN.

§ 113. We now come to the sixth class, namely, *Seamen*, who are peculiarly under the guardianship of the law, and are often called the wards of admiralty. By a law of the United States,² it is provided, that "no sum exceeding one dollar shall be recovered from any seaman or mariner (in the merchant service) by any person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged, shall be ended." It has been held, however, that, inasmuch as the effect of the statute is to avoid, or at least to suspend a contract, which otherwise might be enforced at law forthwith, the defendant must be held to a strict compliance with the statute provision creating his exemption, and must produce the shipping paper, which he is required, by the first section, to sign, and which is, therefore, the proper evidence of his contract.³

§ 113 *a*. The contract of a seaman for his wages is construed by the courts very liberally in his favor, in consideration of the general recklessness and thoughtlessness as well as ignorance which characterize this class of persons. Wherever, therefore, in the shipping articles any stipulation is inserted

¹ Williams v. Brown, 3 Bos. & Pul. 69; Ketletas v. Fleet, 7 Johns. R. 324. The case of Tom, 5 Johns. R. 365.

² 1 Laws of U. S. (Story's ed.), ch. 56, § 4, p. 109.

³ Reynard v. Brecknell, 4 Pick. R. 302.

derogating from the general rights and privileges of seamen, it will be held void in equity and admiralty, unless the nature and operation of the clause have been fully explained to the seaman, and unless an additional and fully adequate compensation be allowed to him on consideration of such stipulation.¹

¹ Mr. Justice Story, in *Brown v. Lull*, 2 Sumner, R. 444, thus lays down the rule and its reasons: "It is well known, that the shipping articles, in their common form, are in perfect coincidence with the general principles of the maritime law as to seamen's wages. It is equally well known, that courts of admiralty are in the habit of watching with scrupulous jealousy every deviation from these principles in the articles, as injurious to the rights of seamen, and founded in an unconscionable inequality of benefits between the parties. Seamen are a class of persons remarkable for their rashness, thoughtlessness, and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part, incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is, that bargains between them and ship-owners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty, on this account, are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned. Courts of admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity. Whenever, therefore, any stipulation is found in the shipping articles, which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded upon imposition or an undue advantage taken of their necessities, and ignorance, and improvidence, unless two things concur; first, that the nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby. This doctrine was fully expounded by Lord Stowell, in his admirable judgment in the case of the *Juliana*, (2 Dod. R. 504); and it was much considered by this court in the case of *Harden v. Gordon*, (2 Mason, R.

So, also, the usual clause that no seaman shall be entitled to his wages, or any part thereof, until *the arrival* of the ship at the port of discharge, is never construed as a condition precedent, but as an indication of time and place of payment.¹

§ 114. The contract made by a seaman for his wages, is of a peculiar character, and seems to demand some brief consideration in this place. And in the first place, let us consider when he is entitled to wages, and secondly, when he forfeits or loses his wages. The first rule is, that freight is the mother of wages, and if the ship have earned its freight, the seaman has earned his wages.² If a ship complete her outward voyage, and earn freight, but perish on the homeward voyage, the seaman will be entitled to wages for the outward voyage, unless the two be, by agreement, consolidated into one.³ Wherever a voyage is divided by various ports of delivery, a

541, 556, 557); and it has received the high sanction of Mr. Chancellor Kent, in his Commentaries (vol. iii. § 40, p. 193). I know not, indeed, that this doctrine has ever been broken in upon in courts of admiralty, or in courts of equity. The latter courts are accustomed to apply it to classes of cases far more extensive in their reach and operation; to cases of young heirs selling their expectancies; to cases of reversioners and remainder-men dealing with their estates; and to cases of wards dealing with their guardians; and above all, to cases of seamen dealing with their prize-money and other interests. If courts of law have felt themselves bound down to a more limited exercise of jurisdiction, as it seems from the cases of *Appleby v. Dodd*, (8 East, R. 300); and *Jesse v. Roy*, (1 Crompt. Jerv. & Rosc. R. 316, 329, 339,) that they are, it is not, that they are insensible of the justice and importance of these considerations, but because they are restrained from applying them by the more strict rules of the jurisprudence of the common law, which they are called upon to administer." See also *The Betsey v. Rhoda*, in the District Court of Maine, 3 New York Legal Observer, 215.

¹ *Swift v. Clark*, 15 Mass. R. 173; *Johnson v. Sims*, 1 Peters, Adm. R. 215; *The George Horne*, 1 Hagg. Adm. R. 370.

² *Abbott on Shipping*, Pt. V. ch. 11, p. 558.

³ *Ibid.* Anon. 1 Lord Raym. R. 639; 12 Mod. 438; *Appleby v. Dods*, 8 East, R. 300; *Jesse v. Ray*, 4 Tyrwh. R. 626; *The Juliana*, 2 Dods. R. 504; *Pitman v. Hooper*, 3 Sumner, R. 286; *Locke v. Swan*, 13 Mass. R. 76; *Moore v. Jones*, 15 Mass. R. 524; *The Cynthia*, 1 Peters, Adm. R. 204.

proportional claim for wages attaches at each of such ports, and all attempts to evade that title by renunciations, obtained from the mariners without any consideration, by collateral bonds or contracts inserted in the body of the shipping articles, are void.¹ So, also, the sickness of the seaman during the voyage, or his inability to perform his work, in consequence of any injury received in the service of the vessel, will not destroy his right to receive wages.² So, also, if a master, in violation of his contract, discharge a seaman from the service of the ship during the voyage, he will still be entitled to full wages to the end of the voyage, deducting any wages which he may, during such time, have earned in another vessel.³ So, also, if the master put a seaman forcibly ashore and leave him;⁴ or if the seaman leave the ship, because there are not sufficient provisions on board, or for cruelty, he does not lose his wages.⁵ But, although repeated acts of cruelty and oppression on the part of the master will justify a seaman in abandoning the vessel, yet a single act of assault and battery will not, although it exceed the bounds of moderation, unless, indeed, there be reasonable grounds of apprehension, that such acts will be repeated.⁶ In case a seaman die during the voyage, the better opinion seems to be, that his heirs and representatives can recover wages up to the time of

¹ Per Mr. Justice Story; Abbott on Shipping, (Am. Ed.) 448; Chancellor Kent, in 3 Kent, Comm. 190; *Edwards v. Child*, 2 Verm. R. 727.

² Abbott on Shipping, Pt. V. ch. 11, p. 552; *Chandler v. Grieves*, 2 II. Black. R. 606, note (a); *Williams v. The Brig Hope*, 1 Peters, Adm. R. 138; *Holmes v. Hutchinson*, Gilpin, R. 448.

³ *Robinet v. The Ship Exeter*, 2 Rob. Adm. R. 261; *The Beaver*, 3 Rob. Adm. 92; *Curtis on Merch. Seamen*, 300, and cases cited. *The Rovena*, Ware, Adm. R. 309; *The Nimrod*, Ware, Adm. R. 9; *Girard v. Ware*, Peters, C. C. R. 142.

⁴ *Girard v. Ware*, Peters, C. C. R. 142.

⁵ *The Maria*, 1 Peters, Adm. Decis. 186; *Castillia v. Stewart*, 1 Hagg. Adm. R. 59; *The Eliza*, 1 Hagg. Adm. R. 186; *Rice v. The Polly & Kitty*, 2 Peters, Adm. R. 415; *Ward v. Ames*, 9 Johns. R. 138.

⁶ *Steele v. Thatcher*, Ware, Adm. R. 91.

his death and no longer.¹ Again, if, after the seamen are hired, the owner do not send the ship on the voyage, they must be paid for the time during which they worked on board the vessel.² But if a seaman be incompetent to perform his duty properly, he is liable to have a deduction made from his wages, so as to conform the recompense to the worth of his services.³ And a loss to the ship or cargo, occasioned by his gross negligence, may be set off against his wages.⁴ But where a seaman might have been discharged in the course of the voyage for gross misbehavior, if the master refuse to discharge him, and leave him in imprisonment abroad, he will be entitled to his wages, until his return, after deducting from the claim his period of imprisonment.⁵

§ 114 *a*. Where the seaman ships on a general trading or freighting voyage without any limitation of time, or any certain destination or fixed terminus to the voyage, either the master or mariner may put an end to the contract at any port, provided it be not done at a time or under circumstances particularly onerous or injurious to the other party.⁶

¹ 3 Kent's Comm. in Lect. 46, p. 189, and cases cited; *Armstrong v. Smith*, 4 Bos. & Pul. 299; *Cary v. The Kitty*, Bee's Adm. R. 255. But see *Nattershorn v. The Hazard*, 2 Hall, L. J. 359. But see *Cutter v. Powell*, 6 T. R. 320; *Beale v. Thompson*, 3 Bos. & Pul. 425. The decisions are contradictory, some assuming that the wages for the whole voyage are recoverable, and some asserting that the wages to the death of the seaman, are alone recoverable. Mr. Chancellor Kent, in his Commentaries, (Lect. 46, p. 196,) gives the weight of his opinion in favor of the rule stated in the text. See, however, *Walton v. The Ship Neptune*, 1 Peters, Adm. R. 142; *Sims v. Jackson*, 1 Peters, Adm. R. 157, note; s. c. 1 Marsh. C. C. R. 414. See *Curtis on Merch. Seamen*, 293; *Sherwood v. Mackintosh*, Ware, Adm. R. 109.

² *Wells v. Osman*, 2 Lord Raym. R. 1044.

³ *Atkins v. Burrows*, 1 Peters, Adm. R. 247; *Mitchell v. The Ship Orozimbo*, 1 Peters, Adm. R. 250; *Sherwood v. McIntosh*, Ware, R. 109.

⁴ *The New Phoenix*, 2 Hagg. Adm. R. 420; *Brown v. The Ship Neptune*, Gilpin, D. C. R. 98.

⁵ *Buck v. Dane*, 12 Serg. & Rawle, 566.

⁶ *The Crusader*, Ware, R. 449.

§ 115. Seamen are bound to exert themselves to their utmost in the service of the ship, for the compensation agreed upon, and any promise of additional reward, made when the ship is in distress, for the purpose of stimulating their efforts to save her, are treated as void; especially if there be any unfair practices, or reluctance to do their duty, on the part of the sailors.¹ Yet if the vessel be wrecked, and parts thereof and of the cargo be saved by the crew, they having performed extraordinary services as salvors, it seems that they would be entitled to receive salvage.² Ordinarily, however, a seaman is not absolved from his duty to remain by the vessel, and give his best aid to her, in case of shipwreck; and it is only under very peculiar and uncommon circumstances, that a seaman, whose connection with the vessel is not dissolved, can claim salvage. Whether shipwreck constitutes an exception to the rule, that wages depend upon the earnings of freight, so as to enable seamen who have saved the fragments of a ship to recover wages, as far as the value of those fragments will permit, is a much vexed question, but it seems now to be the inclination of opinion, that it does constitute an exception, and that wages may be recovered to the extent of the worth of the materials saved.³ Where the mariner's connection with the ves-

¹ *Harris v. Watson*, Peake, N. P. C. 72; *Stilk v. Myrick*, 2 Camp. R. 317; *Thompson v. Havelock*, 1 Camp. R. 527; *Abbott on Shipping*, Pt. II. ch. 4, p. 146; *Harris v. Carter*, 25 Eng. Law & Eq. R. 220; *The Araminta*, 29 Eng. Law & Eq. R. 582.

² *The Two Catherines*, 2 Mason, R. 334; *Pitman v. Hooper*, 3 Sumner, R. 60; *The Neptune*, 1 Hagg. Adm. R. 227; *Hobart v. Drogan*, 10 Peters, R. 122; *Taylor v. The Cato*, 1 Peters, Adm. R. 48; *The Neptune*, 1 Hagg. Adm. R. 227.

³ *Pitman v. Hooper*, 3 Sumner, R. 290; *The Neptune*, 1 Hagg. Adm. R. 227; *The Two Catherines*, 2 Mason, R. 334; *Abbott on Shipping*, p. 451, n. 1, (Am. Ed. 1829,) and note by Mr. Justice Story; *Lewis v. The Elizabeth & Jane*, Ware, R. 41; *Taylor v. The Cato*, 1 Peters, Adm. R. 48; *Giles v. The Cynthia*, 1 Peters, Adm. R. 203; *Adams v. The Sophia*, Gilpin, R. 77; *Brackett v. The Hercules*, Gilpin, R. 184; *Weeks v. The Catherina Maria*, 2 Peters, Adm. R. 424; *Curtis on Merchant Seamen*, p. 285. But the Supreme Courts of New York and Massachusetts have treated the claim of the seamen

sel has been dissolved *de facto*, as if the captain desert the vessel with his crew, without question he may then become a salvor and claim salvage in like manner as a stranger, but he loses all claim for wages.¹

§ 115 *a*. By a statute of the United States a seaman is entitled to his wages "as soon as the voyage is ended, and the cargo or ballast fully discharged at the last port of delivery."² The construction given to this claim is, that the wages are due upon the discharge of the seamen; and if by the terms of the contract or the usage at the place where the contract is completed, the seaman's term of service expires with the mooring of the vessel at the wharf, and before the unlading of the cargo, his claim to wages commences from such time. The question whether the cargo must be discharged before such right accrues, depends upon the custom of the port, in the absence of a special contract.³

§ 116. By act of Congress, one third of the seamen's wages is due at every port where the ship unlades and delivers her cargo, unless there be a contract to the contrary; and if the wages be not paid in ten days after the cargo and ballast are fully discharged, admiralty process *in rem* may be instituted against the ship.⁴

as a claim of salvage, and do not admit shipwreck to be an exception. *Frothingham v. Prince*, 3 Mass. R. 568; *Coffin v. Storer*, 5 Mass. R. 252; *Dunnett v. Tomhagen*, 3 Johns. R. 154. See also, 3 Kent's Comm. Lect. 46, p. 195. But see *Jugenson v. The Catherina Maria*, 2 Peters, Adm. R. 424.

¹ *Mason v. The Ship Blaireau*, 2 Cranch, R. 240, 270; *The Neptune*, 1 Hagg. Adm. R. 236, 237; *Hobart v. Drogan*, 10 Peters, S. C. R. 108; *Curtis on Merchant Seamen*, p. 289.

² U. S. Laws, ch. 56, § 6, Act of July 20, 1790.

³ *The Mary, Ware*, Adm. R. 456, 458; *The Ship Susan*, 1 Peters, Adm. R. 165; *The Philadelphia*, 1 Peters, Adm. R. 210; *The Happy Return*, 1 Peters, Adm. R. 255; *Holmes v. Bradshaw*, Dunlap, Adm. Pr. 99.

⁴ Act of Congress, 20th July, 1790, ch. 29, § 6.

§ 117. A seaman has a lien for his wages on the ship itself, and on the freight. But he has no lien on the cargo, as cargo, although so far as the cargo is subject to freight, he may attach it as security for the freight that may be due.¹ In respect to the ship it has been said, that "he has a right to cling to the last plank, in satisfaction of his wages."² This lien of the mariner is not, however, of the same nature as the common law lien, and is not dependent on possession.³ It is merely a special charge upon the vessel or freight, and follows it wherever it goes, attaching to the vessel or to its proceeds, according to the option of the mariner,⁴ and entitled to priority of payment over all the other debts of the vessel.⁵ It is destroyed by the utter destruction of the vessel, by total and absolute payment of the wages, or by prescription, laches, or renunciation of his right, by the mariner. There is no fixed rule, as to what lapse of time will constitute such prescription, or laches, or renunciation of right, but each case must depend on its peculiar circumstances.⁶ In the admiralty courts of America, the statute of limitations does not run against suits by mariners for their wages.⁷

§ 117 *a*. But this right to wages and this lien on the vessel

¹ *The Lady Durham*, 3 Hagg. Adm. R. 200.

² Lord Stowell in *The Sydney Cove*, 2 Dods. Adm. R. 13; *The Neptune*, 1 Hagg. Adm. R. 227; *Lewis v. The Elizabeth and Jane, Ware*, Adm. R. 41; *Pitman v. Hooper*, 3 Sumner, R. 50.

³ *Ex parte Foster*, 2 Story, R. 145.

⁴ *Sheppard v. Taylor*, 5 Peters, S. C. R. 675; *Brown v. Lull*, 2 Sumner, R. 443; *The Nestor*, 1 Sumner, R. 73; *The Neptune*, 1 Hagg. Adm. R. 227; *The Dunvegan Castle*, 3 Hagg. R. 229; *Curtis on Merchant Seamen*, p. 317, and cases cited.

⁵ *The Madonna d'Idra*, 1 Dods. Adm. R. 37; *The Sydney Cove*, 2 Dods. Adm. R. 1; *The Ship Virgin*, 8 Peters, S. C. R. 538; *The Paragon, Ware*, R. 322.

⁶ *Brown v. Jones*, 2 Gall. R. 481; *Willard v. Dorr*, 3 Mason, R. 91, 161; *The Sarah Ann*, 2 Sumner, R. 206; *Pitman v. Hooper*, 3 Sumner, R. 286; *The Rebecca*, 5 Rob. Adm. R. 102.

⁷ *Ibid.* *Brown v. Jones*, 2 Gall. R. 481.

and on every plank of her, does not apply in cases where the vessel has been abandoned as derelict and become the subject of salvage by others; but only in cases where the vessel has been wrecked and broken up, and the seamen themselves are the salvors.¹

§ 118. In the next place, let us consider by what means a mariner may lose or forfeit his wages. And first, as to the modes in which he may lose his wages. Usually we have seen, that whenever freight is earned, wages are earned, and the converse of this rule is generally true, that where freight is lost, wages are lost. If, therefore, there be a total loss or capture of the vessel during her voyage, the seaman loses his wages.² But the hypothecation, or even the sale of the ship, if not made under the authority of a competent court, will not destroy his claim for wages, and the mariner will be pre-

¹ *Lewis v. The Elizabeth and Jane, Ware*, Adm. R. 91. In this case, Mr. Justice Ware says: "The general rule founded on principles of policy, is, that wages are dependent on the successful termination of the voyage. Seamen have then their threefold remedy, against the master, the owners, and the ship. Until that time their right to wages, and consequently their lien on the ship, are but inchoate and contingent. They become perfect on her safe arrival at the port of destination. Any misfortune that destroys the voyage, puts an end to the claim for wages, or rather prevents its ever coming to maturity. Shipwreck, followed by abandonment, seems necessarily to involve this consequence. The contract is dissolved. The connection of the crew with the ship is at an end. The property is derelict, and the finder acquires a possession and an interest, which the master and mariners cannot legally disturb. They have no longer a right to intermeddle with the goods. The rights of the owner continue, but if he does not appear and make his claim within a year and a day, the title, subject to the salvor's lien, by the law of nations, as now understood, accrues to the sovereign." *The Aquila*, 1 Rob. 34; *Valin*. L. 4, Tit. 9, art. 27; *Jacobsen's Sea Laws*, B. 4, ch. 4; *Dennet v. Tomhagen*, 3 Johns. R. 154.

² *Abbott on Shipping*, Pt. V. ch. 3, § 1, p. 571; *Appleby v. Dods*, 8 East, R. 300; *Abernethy v. Landall*, Dowl. R. 539; *Pitman v. Hooper*, 3 Sumner, R. 50.

ferred to the holder of the bottomry bond.¹ We have also seen, that the wrecking of a vessel will not always destroy his right to wages.² Any partial loss of freight will not touch the right of a seaman to his wages, but the loss of freight must be total.³ But in case of shipwreck, it would seem that the payment of a proportion of freight, for the cargo saved, would not entitle the seamen to wages in the same proportion.⁴ Nor would it seem, that, if freight be advanced, the mariner would have a claim for wages thereupon, in case of destruction of the voyage, since the shipper would be entitled to recover it.⁵

§ 119. Again, if freight be lost by the negligence or misconduct of the master or owner, or be voluntarily abandoned by them, or if the owner contract for freight upon terms or contingencies differing from the general rules of the maritime law, or if no cargo be furnished to the ship on either the outward or the homeward voyage, the mariner will be entitled to receive his wages; and these form an exception to the general rule, that freight is the mother of wages.⁶ The rule in this respect, as stated by Mr. Justice Story, is, that seamen are entitled to their wages, where freight is or *might be* earned.⁷

¹ The Sydney Cove, 2 Dods. Adm. R. 11; The Madonna d'Idra, 1 Dods. Adm. R. 37; The Lady Durham, 3 Hagg. Adm. R. 196.

² Ante, § 115.

³ Pitman v. Hooper, 3 Sumner, R. 67, 286.

⁴ Pitman v. Hooper, 3 Sumner, R. 67, 286; The Neptune, 1 Hagg. Adm. R. 227.

⁵ Pitman v. Hooper, 3 Sumner, R. 67, 286, overruling the anonymous case, in 2 Show. R. 283, (291). See Watson v. Duykinck, 3 Johns. R. 335; Griggs v. Austin, 3 Pick. R. 20.

⁶ The Saratoga, 2 Gall. R. 175; Wolf v. The Oder, 2 Peters, Adm. R. 261; Hoyt v. Wildfire, 3 Johns. R. 518; The Two Catherinees, 2 Mason, R. 319; Pitman v. Hooper, 3 Sumner, R. 290; The Juliana, 2 Dods. Adm. R. 501; Van Beuren v. Wilson, 9 Cowen, R. 158.

⁷ Pitman v. Hooper, 3 Sumner, R. 290. In this case Mr. Justice Story

§ 120. In the next place, a seaman may, by his conduct, forfeit his wages either totally or partially, and whatever amounts to a breach of duty may affect his wages. Desertion, which, in the maritime law, signifies not merely an unauthorized absence from the ship, but an unauthorized absence with intent not to return, *animo non revertendi*, consti-

said: "The general formulary, as laid down in Lord Tenterden's Treatise on Shipping, (Abbott on Ship. P. 4, ch. 2, § 4, p. 447,) is this: 'The payment of wages is generally dependent upon the payment of freight. If the ship has earned its freight, the seamen, who have served on board the ship have in like manner earned their wages. And, as in general, if a ship chartered on a voyage out and home, has delivered her outward bound cargo, but perishes in the homeward voyage, the freight for the outward voyage is due; so, in the same case, the seamen are entitled to receive their wages for the time employed in the outward voyage, and the unloading of the cargo, unless by the terms of the contract, the outward and homeward voyages are consolidated into one.' To language so very general, certainly nothing further than general truth can be, or ought to be attributed. In truth, however, the language is far from being accurate; and it is not comprehensive enough to embrace the exceptions to the general rule, or even all the cases, which fall within it. Thus, it is not true in every case in the maritime law, that the payment of wages is dependent upon the payment of freight; for if freight be earned, it is wholly immaterial, whether it be paid or not. So the earning of freight is by no means necessary in all cases to give a title to wages; as, for example, where the ship performs her voyage without the owner having furnished any cargo, or where there is a special contract between the owner and freighter, varying the right to freight from the general law; as where the freight is made dependent upon the performance both of the outward and the homeward voyage. The case of shipwreck, where materials are saved from the wreck, furnishes a still stronger illustration; for in such a case the seamen earn their wages, as far as the materials saved go, even though the freight for the homeward voyage is wholly lost. So that a moment's reflection will teach us, that the general text of Lord Tenterden does not contain a full or an accurate exposition of the whole doctrine applicable to the subject. It affords one, out of many illustrations of the maxim, *In generalibus versatur error*. If the doctrine be susceptible of any exact generalization, (which perhaps it is not,) it would be more correct to say, that the general rule, though not the universal rule, is, that the seamen are entitled to wages for the full period of their employment in the ship's service for any particular voyage, in which freight is or might be earned by the owner."

tutes a forfeiture of all title to wages, and to rights in the proceeds of the voyage in the nature of wages.¹ If a seaman quit a ship without leave, or in disobedience of orders, but with an intent to return to duty, although he would be punishable not only by personal chastisement, but by damages by way of diminished compensation, yet such conduct does not constitute the offence of desertion for which the maritime law enacts a forfeiture of all antecedent wages.² By statute of the United States, however, it is enacted that forty-eight hours absence from the ship without leave, if a proper entry thereof be made in the log-book, shall be deemed a desertion.³ This statute is only construed to give to the mariner, who absents himself without leave, the space of forty-eight hours, within which if he return he is not guilty of desertion. But if he do absent himself, it is at his own peril, and if he be unable, through any chance, to rejoin the ship, he forfeits his wages.⁴ But although desertion is generally attended with a total forfeiture of wages, yet there are cases, where the party either has a strong excuse, and the circumstances are exculpatory or alleviating, or where, having a *locus penitentiae*, he acknowledges his fault, and offers to return to duty within a reasonable time, in which only a partial forfeiture will be decreed.⁵

§ 120 *a*. A desertion must, however, take place during the

¹ *Coffin v. Jenkins*, 3 Story, R. 113; *Abbott on Shipping*, Pt. V. ch. 3, p. 576; *The Rovenia*, Ware, Adm. R. 309; *Spencer v. Eustis*, 8 Shep. R. 519.

² Per Mr. Justice Story, *Cloutman v. Tunison*, 1 Sumner, R. 376; *The Ship Mentor*, 4 Mason, R. 84; 3 Kent, Comm. Lect. 96, p. 198, 199.

³ Act of 1790, ch. 56, (29), § 5, commented on in *Cloutman v. Tunison*, 1 Sumner, R. 373, and *Coffin v. Jenkins*, 3 Story, R. 113.

⁴ *Coffin v. Jenkins*, 3 Story, R. 113; *Cloutman v. Tunison*, 1 Sumner, R. 373.

⁵ *Ibid.*; *Boardman v. The Elizabeth*, 1 Peters, Ad. R. 175; *Dixon v. The Cyprus*, 2 Peters, Adm. R. 407; *The Mentor*, 4 Mason, R. 84. See also the cases collected in *Kinne's Law Compendium*, Vol. I. p. 637, (tit. *The Law of Ships and Maritime Commerce*).

voyage, and before its termination. The question arises, therefore, when the voyage is to be considered ended. The rule on this point is that the voyage is ended, when the ship has arrived at her last port of destination and is moored in good safety in her proper and accustomed place. And although seamen are ordinarily bound to stay by the ship, and assist in the unloading of the cargo, unless there be some express or implied agreement growing out of usage, to the contrary, yet a non-compliance with this duty, will not be a desertion so as to forfeit all the seaman's wages.¹

¹ *Cloutman v. Tunison*, 1 Sumner, R. 377; *The Pearl*, 5 Rob. R. 224; *The Baltic Merchant*, Edwards, R. 86. In the first case cited, Mr. Justice Story lays down the whole doctrine thus: "But there must not only be a desertion, but the desertion must be in the course of the voyage, and before its termination in the home port, to justify an infliction of the forfeiture by the Maritime Law. It is not sufficient, that there has been a desertion after the voyage has ended; although it be within the period for which the party is bound to do duty on board the ship. It must be *during the voyage*. Now, when is the voyage ended, in the sense of the Maritime Law? I answer, when the ship has arrived at her last port of destination, and is moored in good safety in the proper and accustomed place. I do not say that the officers or seamen are then discharged from any further duty, and are not bound to attend to the unlivery of the cargo. On the contrary, I maintain, that the seamen, and *à fortiori* the officers are bound to remain by the ship, and watch over her concerns, and assist in the unlivery of the cargo, if made in a seasonable time; unless there be some express or implied agreement, or established usage, to dispense with their further services. There is a clause in the common ship articles, pointed to this very duty. 'And whereas' (says the clause) 'it is customary for the officers and seamen, on the vessel's return home, in the harbor, and whilst her cargo is delivering, to go on shore each night to sleep, greatly to the prejudice of such vessel and freighters, be it further agreed by the said parties, that neither officer or seamen shall, on any pretence whatever, be entitled to such indulgence; but shall do their duty by day in discharging the cargo, and keep such watch by night as the master shall think proper to order for the preservation of the same.' And this very stipulation is in the present articles, and constitutes a part of the contract. But it is one thing to be responsible for a violation of the terms of the contract; and quite another thing to incur the visitation of the maritime penalty of forfeiture of the whole wages of the voyage. In the present case, it is, in my judgment, quite clear that the voyage was ended, so far as the Maritime Law is concerned, at

§ 120 *b*. If a seaman, in the course of the voyage, or in a foreign port, claim higher wages than those stated in the shipping

the time when the asserted act of desertion took place. The vessel was not only safely moored, but had come to the wharf, and had been duly entered, and part of her cargo had been discharged. However reprehensible the act, then, was, it was not a desertion during the voyage; and therefore, so far as the forfeiture turns upon the principles of the Maritime Law, it was not incurred. Nor is there any thing novel in this doctrine. It is manifestly implied in the reasoning of that truly great Judge, (*Princeps inter pares*.) Lord Stowell, in the case of *The Pearl*, (5 Rob. R. 224.) which has been cited at the bar. But it is still more directly announced in the more recent case of *The Baltic Merchant*, (Edwards' R. 86). In this latter case, which turned upon the very point, whether the voyage was ended by a mere arrival in port, Lord Stowell on that occasion said: 'By interpretation of law, the voyage is not completed by the mere act of arrival. The act of mooring is an act to be done by the crew; and *their duty extends to the time of the unlivery of the cargo*. There is no period at which the cargo is more exposed to hazard, than when it is in the act of being transferred from the ship to the shore; and therefore the law, not only the old law, but particularly the Statute, by which the West India trade has been in later times regulated,' (and the case before him was of a West India ship,) 'has enjoined in the strictest manner, that the mariners shall stay by the vessel, until the cargo is actually delivered. I take this to have been always a part of the duty of the mariners; their contract is legally understood to go this length; and there never can have been a time, when the owner was not entitled to some consideration against the mariners, on account of the non-completion of the contract. This is a consideration not *in modum pænæ*, but it is a civil compensation for injury received, existing in all reason and justice antecedently to any statute upon the subject.' His Lordship here points out the very distinction between cases of compensation for an imperfect performance of the contract, and cases of forfeiture for desertion, which are strictly *in pœnam*. And he afterwards proceeded to decide, that the voyage in that case could not, upon the true construction of the statutes on the subject of the West India trade, be deemed to be ended (not, until the cargo was unlivered, but) until the vessel was safely moored in the West India docks; and when so moored, he held the voyage complete and ended, so that the forfeiture for desertion would not afterwards attach. But, the desertion being before such mooring, he pronounced for a forfeiture in the case. It seems to me, that this decision is as fully in point as could be desired; and it affirms, what has always appeared to me to be the true import of the Maritime Law. I am therefore of opinion, that, upon the mere footing of the Maritime Law, no forfeiture of wages has been incurred; because, in the first place, I am not satisfied, that

articles, and induce the master to assent thereto by threats of deserting the vessel, the contract thus made would be utterly void.¹

§ 121. But, ordinarily, in cases of breach of duty, a total forfeiture of wages will not be decreed, unless the misconduct be of an aggravated nature. Thus, neglect of duty, or disobedience, or drunkenness, unless it be habitual and excessive,² will not ordinarily work a total forfeiture of wages. So, also, embezzlement is generally only a subject for contribution to the extent of the loss.³ In ordinary cases, the breach of duty must be habitual, and of such a nature as to endanger the safety of the vessel, or to incapacitate the mariner from the proper performance of his duty, and a single act will not be sufficient to work a total forfeiture.⁴

there was any quitting the ship *animo non revertendi*, with an intention to desert the service ; and, in the next place, because, at the time of the asserted absence, the voyage was ended."

¹ *Harris v. Carter*, 25 Eng. Law & Eq. R. 221 ; *Bartlett v. Wyman*, 14 Johns. R. 261. In this case, the court referring to the Act of Congress of the 20th of July, 1790, said : " This statute requires, under a penalty, every master of a ship, or vessel, bound from a port in the United States, to any foreign port, before he proceeds on the voyage, to make an agreement in writing, or print, with every seaman, or mariner, on board, with the exception of apprentices, or servants, declaring the voyage, and term of time for which the seamen, or mariner, shall be shipped. In the present case this was done, and the rate of wages fixed at seventeen dollars per month, for the whole voyage. To allow the seamen, at an intermediate port, to exact higher wages, under the threat of deserting the ship, and to sanction this exaction by holding the contract, thus extorted, binding on the master of the ship, would be, not only against the plain intention of the statute, but would be holding out encouragement to a violation of duty, as well as of contract. The statute protects the mariner, and guards his rights in all essential points ; and to put the master at the mercy of the crew, takes away all reciprocity.

² *Robinet v. The Ship Exeter*, 2 Rob. Adm. R. 261 ; *Abbott on Shipping*, Pt. IV. ch. 2, p. 584 ; *Orne v. Townsend*, 4 Mason, R. 541 ; *The Mentor*, 4 Mason, R. 84 ; *The Lady Campbell*, 2 Hagg. Adm. R. 5.

³ *Spurr v. Pearson*, 1 Mason, R. 104 ; *Mariners v. The Kensington*, 1 Peters, Adm. R. 239.

⁴ *Ibid.* *The Ship Mentor*, 4 Mason, R. 93.

§ 122. Again, misconduct generally only works a forfeiture of wages already earned, and if the seaman repent, and do his duty faithfully afterwards, he is entitled to wages therefor. Thus, in case of a revolt, although the wages antecedently earned are thereby forfeited, yet if the seamen perform their duty faithfully afterwards, they are entitled to wages accruing after the revolt.¹ Again, the master may pardon any offence, and if he do, no forfeiture attaches, and generally, if the seaman be received again, or retained on board in the ordinary performance of his duty, a presumption of pardon is thereby created,²—but only a presumption.³ So, also, where the misconduct is not aggravated, and punishment is inflicted therefor at the time, wages will not be forfeited.⁴

¹ *The Ship Mentor*, 4 Mason, R. 95; *Dixon v. The Cyrus*, 2 Peters, Adm. R. 412; *Coffin v. Jenkins*, 3 Story, R. 119.

² *Cloutman v. Tunison*, 1 Sumner, R. 373; *The Test*, 3 Hagg. Adm. R. 307, 315; *Thorne v. White*, 1 Peters, Adm. R. 168; *Dixon v. The Cyrus*, 2 Peters, Adm. R. 412.

³ *The Ship Mentor*, 4 Mason, R. 95.

⁴ *The Ealing Grove*, 2 Hagg. Adm. R. 15; *Bray v. The Atalanta*, Bee, R. 48; *Lascomb v. Prince*, 12 Mass. R. 576.

CHAPTER III.

CONTRACTS OF AGENTS.

§ 123. HAVING now considered the competency of persons to contract in their own behalf, we shall proceed to the consideration of contracts made by third persons, having no original interest in the subject-matter, in behalf of the parties essentially and principally interested. And in the consideration of this subject, we shall first treat of the principles governing the contracts of agent in general, and then shall proceed to the contracts of special agents acting under peculiar circumstances, which modify their powers and liabilities.

§ 124. In the first place, as to the general principles relating to the contracts of agents. Whenever any person, competent to do any act for himself, employs another person to do it, the employer is called the principal, the person employed is called the agent; and the relation created between the parties is termed an agency.¹ When the agency is created by a formal written instrument, especially if it be under seal, such instrument is called a letter of attorney.²

§ 125. Whatever a person may do in his own right, he may do by an agent. Every person, therefore, may be a principal, if he be of full age, unless legally or actually disabled. The

¹ Story on Agency, § 3.

² By foreign writers such an instrument is called a *procuracion*, and the agent a *procurator*. Dig. Lib. 3, tit. 3, l. 1; Heinecc. ad Pand. Lib. 3, tit. 3, § 415, 423; Pothier, Pand. Lib. 3, tit. 3, n. 2.

usual rules of disability to contract, before stated, apply equally to principals.¹

§ 126. Any person may be an agent, who is not actually disabled by weakness of mind, or want of understanding. Legal disability to contract will not incapacitate a person from becoming an agent.² Thus, although a person under age cannot contract so as to render himself responsible, he can, nevertheless, contract as agent for another person, so as to bind such person.³ No person can take upon himself, however, incompatible duties and characters, as agent, or become agent in a transaction, where he has an adverse interest or employment; for the principal is presumed to stipulate for the disinterested skill and diligence of the agent, applied for his exclusive benefit. Thus, the assignee of a bankrupt cannot purchase the debts or estate of the bankrupt on his own account.⁴ So, also, if an agent secretly sell his own goods to his principal, the principal may avoid the agreement. So, if he purchase as principal, goods, which he sells as agent, the contract is void.⁵ So, where an agent was appointed by the trustees of an unincorporated land company, to receive the shares at a certain price in the final settlement with purchasers

¹ Story on Agency, § 6. Ante, Chap. II.

² Co. Lit. 52 a.; Bac. Abr. Authority, B.; *Emerson v. Blonden*, 1 Esp. R. 142; Story on Agency, § 7.

³ *Walkins v. Vince*, 2 Stark. R. 368; Pothier on Oblig. n. 450.

⁴ *Parkist v. Alexander*, 1 Johns. Ch. R. 309; 1 Story on Eq. Jurisp. § 314, § 316, § 321, § 322.

⁵ Paley on Agency, by Lloyd, 3d ed. ch. 1, Pt. 1, § 7, n. 5, p. 33; 1 Story on Eq. § 210, § 315, § 316; Story on Agency, § 9, § 211, and cases cited; *Wright v. Dannah*, 2 Camp. 203; *Gillett v. Peppercorn*, 3 Beavan, 78; *Barker v. Marine Ins. Co.* 2 Mason, R. 369; *Church v. Marine Ins. Co.* 1 Mason, R. 341; *Dixon v. Broomfield*, 2 Chit. 205; *Lees v. Nuttall*, 1 Russ. & Myl. 53; s. c. 2 Mylne & Keene, 819; *Copeland v. Merch. Ins. Co.* 6 Pick. 198; *Reed v. Warner*, 5 Paige, 650; *Lowther v. Lowther*, 13 Ves. 103; *Reed v. Norris*, 2 M. & Craig, 374; *Beal v. McKiernan*, 6 Louis. 407; Bacon, Abr. Authority D.; Story on Agency, § 13.

for lots, it was held, that he could not purchase stock for his own use, but that a purchase by him would be regarded as made for the use of the company.¹ And if it appear, that an agent has purchased the estate of his principal in the name of another person, instead of his own, however fair the transaction may be in other respects, it has no validity in a court of equity.² Nor is it necessary in such case to show that the sale was made at an under value.³ An agent may, however, purchase of his principal, if he deal with him openly, disclosing all that he knows with respect to the property.⁴

§ 127. Although, generally, a person may delegate authority to another, to do whatever he can do himself, yet if the act to be done be either unlawful, or if it be a personal trust or confidence, which he is impliedly prohibited from delegating, he may not do it by another.⁵ Thus, if a power to sell an estate or make a lease, be given to another, as attorney, or executor, it cannot be delegated;⁶ because the ability and integrity of the individual constitute the reason of the trust. The same rule applies generally to brokers and factors.⁷ Whenever, therefore, it is intended, that an agent shall have power to delegate his authority, it should be expressly given to him. Yet whenever such authority is required by law, or by usage of trade, or is implied in the nature of the contract, it may be

¹ *M'Kinley v. Irvine*, 13 Ala. R. 681.

² *Murphey v. O'Shea*, 2 Jones & Lat. 422; *Trevellyan v. Chanter*, 9 Bea. R. 140.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Commercial Bank v. Norton*, 1 Hill, R. 501; *Lyon v. Jerome*, 26 Wend. R. 485.

⁶ *Coombe's Case*, 9 Co. R. 75; *Com. Dig. Attorney*, C. 3.

⁷ *Catlin v. Bell*, 4 Camp. 183; *Solly v. Rathbone*, 2 Maule & Selw. 298; *Cochran v. Irlam*, 2 Maule & Selw. 301 n.; *Schmaling v. Thomlinson*, 6 Taunt. R. 146; 1 Bell, Comm. 338, § 412; *Henderson v. Barnewell*, 1 Y. & J. 387; *Story on Agency*, § 33, 34.

delegated;¹ and the substituted agent will be responsible to the original agent, as well as to the principal.² The authority of a sub-agent, given with consent of the principal, is not determined by the death of the agent appointing him.³ But the authority of a sub-agent, appointed without due authority, terminates with the death of the first agent, for he is in such cases the principal of the sub-agent, and the latter must look alone to the principal agent for compensation.⁴

§ 128. The authority of an agent may be created by parol, and may be either expressly given, or be implied from the acts of the parties. Thus, wherever a man stands by and suffers another, knowingly, to do acts in his name, he is presumed to have given him authority to do those acts.⁵ As if a man suffer another to sell his property, and do not object, the sale will be valid. So, also, where the act of the agent is exercised in so open and notorious a manner, as to create a *primâ facie* presumption of knowledge on the part of the principal, the latter will be liable. Thus, where a ship-broker advertised a ship at the Royal Exchange, and at the other usual places as "warranted to sail with convoy," and the ship did not sail with convoy, and was captured, it was held, in an action by one of the shippers against the owner, that the latter was bound by the advertisement of the agent, although no actual authority had been given, since its publicity afforded to all a presumption that it was authorized.⁶ So, also, if the principal send

¹ *Lausatt v. Lippincott*, 6 Serg. & Rawle, 386; *Cowles v. Tricothick*, 9 Ves. 231, 251; *Shipley v. Keymer*, 1 M. & S. 481; *Cochran v. Irlam*, 2 Maule & Selw. 301, note, 303. See also *Dorchester and Milton Bank v. New England Bank*, 1 Cushing, R. 177; *Gillis v. Bailey*, 1 Foster, 149; *Mason v. Joseph*, 1 Smith, 406.

² Story on Agency, § 15; *Wilson v. Smith*, 3 How. S. C. R. 770.

³ *Smith v. White*, 5 Dana, R. 376.

⁴ See *Cleaves v. Stockwell*, 33 Maine, 341; *Cobb v. Becke*, 6 Q. B. Rep. 930; *Robbins v. Fennell*, 11 Q. B. Rep. 248.

⁵ *Pickard v. Sears*, 6 Ad. & Ell. 469, 474, by Lord Denman.

⁶ *Runquist v. Ditchell*, 3 Esp. R. 64.

his commodity to a place where it is the ordinary business of the person to whom it is confided, to sell, it will be presumed to be sent there for sale; as if he send his goods to an auction room, or his horse to a repository for the sale of horses.¹ So, if an agent buy or sell goods for the principal, on credit, and the principal have knowledge thereof, and make no objection, he will be bound.² So, also, an authority to act as agent in respect to a particular transaction or class of transactions will be implied from the fact, that the person, professing to act as agent in the particular case, has been habitually employed to do similar acts by the person whom he ostensibly represents.³ But a person who has been accustomed to perform special acts as agent, will not be impliedly clothed with authority to do other acts, or to act generally as agent.⁴ Thus, if a party had been employed strictly as an agent in bill transactions, he would not be authorized by implication to give a guaranty. So, also, where a party avails himself of acts done by a third person, an agency is implied; as where a manufacturing corporation used certain machinery, ordered by their president, and refused to produce their records, it was held, that the jury might presume a previous authority to buy, or a subsequent ratification of the purchase.⁵

§ 129. To this rule, however, there is one exception, which is, that whenever any act of agency is required to be done,

¹ Pickering v. Busk, 15 East, R. 43.

² Pickering v. Busk, 15 East, 38, 43; Story on Agency, § 89, 91, 94, 95; Paley on Agency, 2; Story on Agency, ch. 5, § 47, et seq.; Hoare v. Dawes, Doug. 371; Coope v. Eyre, 1 H. B. 37; United Ins. Co. v. Scott, 1 Johns. R. 106; Story on Agency, § 39; 3 Kent, Comm. Lect. 43, p. 40 to 50.

³ Neal v. Irving, 1 Esp. R. 61; Brocklebank v. Sugrue, 5 Car. & Payne, 21; Barber v. Gingell, 3 Esp. R. 60; Haughton v. Ewbank, 4 Camp. R. 88; Townsend v. Inglis, Holt, N. P. C. 281; Watkins v. Vince, 2 Stark. R. 368; Warren v. Ocean Ins. Co. 4 Shep. R. 439; Fisher v. Campbell, 9 Porter, R. 210.

⁴ Ibid.; Post, § 134.

⁵ Narraganset Bank v. Atlantic Silk Co. 3 Metcalf, R. 282.

under seal, in the name of the principal, the authority to do such act must be given under seal.¹ An authority to sign an unsealed paper may, however, be given by parol.² The general rule also applies to agencies created by corporations.³

§ 130. Where there are several principals, each having an interest, either distinct from that of the others, or undivided, as in the case of tenants in common, the general rule is, that no one of them can appoint an agent for all, without the consent of all. There is, however, one exception, which obtains in cases of partnership. By the terms of such a contract, each partner becomes interested in the whole subject-matter, and is

¹ Story on Agency, § 49, and cases cited; Co. Litt. 48 *b.* and note, Harg. 2.

² Paley on Agency, by Lloyd, 160, 161; Anon. 12 Mod. 564; Story on Agency, § 50; Baker *v.* Freeman, 35 Maine, 485.

³ The old rule was, that all agencies created by corporations, should be created by their corporate seal. This doctrine has undergone, however, many modifications, and the English rule at the present day, seems to be, that the agent of a corporation need not be appointed under the seal of the corporation, for acts, which are of an ordinary nature, and do not affect the interests of the corporation. See Smith *v.* Birmingham Gas Co. 1 Ad. & Ell. 530, where Mr. Justice Taunton says, "The distinction is between matters which do, and matters which do not affect the interests of the corporation." See also East London Water Works Co. *v.* Bailey, 4 Bing. 283; Beverly *v.* Lincoln Gas Co. 6 Ad. & Ell. 289; and Imperial Gas Light *v.* Coke Co. 6 Ad. & Ell. 846; London and Birmingham Railway *v.* Winter, 1 Craig & Phil. 57. The latest case on the subject is The Mayor of Ludlow *v.* Charlton, 6 Mees. & Welsb. 815. The American doctrine, however, is that stated in the text, to which the English doctrine is every day approximating, and embraces all exercises of authority, which are in any way sanctioned by the corporation itself, or by its delegated directors, in regard to the rights, duties, and interests of the corporation, which are not within the exception stated above, and required to be under seal. Bank of Columbia *v.* Patterson's Admsrs. 7 Cranch, 299, 306, and cases there cited. Bank of U. S. *v.* Dandridge, 12 Wheat. 64, 68, 75, and cases cited. Mott *v.* Hicks, 1 Cowen, 513; Kortright *v.* Buffalo Bank, 20 Wend. 91; Fleckner *v.* Bank of U. S. 8 Wheat. 338; 2 Kent, Comm. Lect. 33, p. 291, (4th Ed.) and cases cited in a note. See also Story on Agency, § 53, and the learned note, containing a discussion of the English cases. See also, post, *Corporations*.

an agent for the other partners.¹ So, also, the exception extends to part owners of ships, where each of them is considered as the agent of all, in respect to the ordinary repairs and employment of the ship.²

§ 130 *a*. Where an authority is given by law to several persons, it may generally be executed by a majority of them.³ But where there are several agents, their authority is joint, not several, and all, therefore, must concur, in order to bind the principal.⁴ This rule, however, receives a liberal interpretation in respect of mercantile transactions; and where goods are consigned to two factors, each is considered as the agent of the other, and responsible for his acts.⁵ So, also, where an agency is given to partners in their partnership name, an execution of the power by one in the name of the firm will bind the principal.⁶

EXTENT OF AGENT'S AUTHORITY.

§ 131. In the next place, as to the *Extent of the Agent's Authority*.—The authority of the agent to bind his principal grows out of the power with which he is expressly or impliedly invested. If his actual power be exceeded, the principal will not be bound, unless he have made him ostensibly his agent, by so treating with him, as to create a presumption of authorized agency, or unless he have held out the agent as possessed of general authority to act in his behalf. If, therefore, one person undertake to act as agent for another, in respect to matters in which he is not authorized, the person

¹ Post, *Contracts of Partners*, § 216.

² 2 Bell, Comm. B. 7, ch. 2, § 4, 1222, 1223, p. 638, (4th ed.); Abbott on Ship. P. 1, ch. 3, § 2 to 9, 68, 77.

³ Ibid. Johnston v. Bingham, 9 Watts & Serg. 56; Low v. Perkins, 10 Verm. R. 532; Union Bank v. Beirne, 1 Grattan, R. 226.

⁴ Jewett v. Alton, 7 N. Hamp. R. 53; Woolsey v. Tompkins, 23 Wend. R. 324.

⁵ Story on Agency, § 42, and cases cited.

⁶ Gordon v. Buchanan, 5 Yerg. R. 71.

whom he professes to represent will be bound, as to third persons, only so far as he has expressly or impliedly held such person out to the public as agent. Thus, if A. have been in the habit of employing B. to do a certain act, or class of acts, and have always consented thereto, and in a special case he do not authorize him, A. will nevertheless be bound, if B. only do what he has been accustomed to do.¹ As, for instance, if B. have repeatedly signed A.'s name to policies of insurance, or have accepted bills for him, a signing of a policy, or an acceptance of a bill by B. in a particular case where he is not authorized, or is expressly forbidden, will bind A., because A. has invested B. with an ostensible and *primâ facie* authority.² But if B. should undertake to do other and different acts, A. would not be bound. So, also, where a servant makes a contract for his master, the master will be bound, if he have permitted the servant previously and habitually to make contracts of a similar character. Thus, if he have authorized the servant to purchase on credit in former cases, and the servant purchase on credit in a particular case, when he is supplied with cash, and ordered to pay, the master will be bound.³ But if the servant had never been authorized to purchase on credit, and he should purchase on credit in a particular case, in violation of his instructions, the master would not be bound.⁴ Again, the same rule holds where one person places another in a position or office from which an authority to make certain contracts in his behalf would be presumed, — as if A. make B. his foreman, and intrust him with the general manage-

¹ *Watkins v. Vince*, 2 Stark. R. 368; *Neal v. Irving*, 1 Esp. R. 61; *Brockelbank v. Sugrue*, 5 Car. & Payne, 21; *Barber v. Gingell*, 3 Esp. R. 60; *Haughton v. Ewbank*, 4 Camp. R. 88; *Townshend v. Inglis*, Holt, R. 281; *Prescott v. Flynn*, 9 Bing. R. 19; s. c. 2 Moore & Scott, 18.

² *Neal v. Irving*, 1 Esp. R. 61; *Watkins v. Vince*, 2 Stark. R. 368.

³ *Sir R. Wayland's Case*, 3 Salk. R. 233; s. c. 1 Ld. Raym. R. 255; *Hazard v. Treadwell*, 4 Strange, R. 506; 1 Shower, R. 95, per Holt, C. J.; *Nickson v. Brohan*, 10 Mod. R. 111.

⁴ *Ibid.*

ment of the business, a contract by B. within the apparent bounds of his authority, would bind A.¹ So, also, the contracts of a surveyor of a public road, known to be in the employ of the commissioners of public highways, will bind his principals.² But if the party trusting a person professing to act as agent do not exercise due caution, and trust the agent negligently, the principal will not be bound. Thus, where the plaintiff contracted to supply the defendant with meat at “5½*d.* per pound, ready money,” and the defendant’s cook was in the habit of ordering meat, and paying for it as soon as it amounted to a few shillings or a guinea, (the defendant giving her the money for such purpose,) and after some time, a new cook in the defendant’s employ suffered the bills to run on, until they amounted to £33 3*s.* 3*d.*, and then ran away, the defendant having all the while paid her in the customary manner, it was held that the plaintiff could not recover the amount from the defendant.³ In all these cases, the question is, whether the principal has clothed the agent with *apparent* authority, and this is a question of fact to be determined by a careful consideration of the circumstances of each particular case.⁴

§ 132. In all cases where an authority is implied from previous acts of a similar kind having been done by the agent, it must be clearly shown that the principal had either expressly authorized the doing of such acts beforehand, or had knowledge of and sanctioned them after they were done; for if he never authorized the agent to act for him, and was

¹ Hazard *v.* Treadwell, 1 Strange, R. 506; Sir R. Wayland’s Case, 3 Salk. R. 233.

² Pochin *v.* Pawley, 1 W. Black. R. 670.

³ Stubbing *v.* Heintz, 1 Peake, R. 47. “The contract,” said Lord Kenyon, “was to deal for ready money, and the plaintiff, when he let the bill run on to such an amount as the sum now claimed, was giving credit to the servant, and not to the defendant.”

⁴ Pickering *v.* Busk, 15 East, R. 43.

ignorant of his having done so, he will not be bound.¹ In determining whether a servant was authorized to purchase on credit, in a case where he is supplied with cash, it becomes important to consider, whether the money was given before or after the purchase, for if it were given before the purchase, he would not have been authorized to purchase on credit.²

§ 133. But the mere fact, that A. has authorized a stranger to act for him on one particular occasion, is not, of itself, sufficient to invest the stranger with an implied authority to contract for him a second time, unless under very peculiar circumstances;³ as where the position of the agent imports peculiar confidence, as in the case of a confidential servant; and this brings us to the distinction between a general and a special agent.

§ 134. There are two kinds of agency; 1st. A special agency; 2d. A general agency. A special agency is an agency to do a single act. A general agency is an authority to do all acts connected with a particular business or transaction.⁴ The fact that the authority of an agent is limited to a

¹ *Davidson v. Stanley*, 3 Scott, N. R. 49; *Fearn v. Filica*, 7 Mann. & Grang. 523.

² *Anderson v. Coonley*, 21 Wend. R. 279.

³ *Rusby v. Scarlett*, 5 Esp. R. 76. In this case, where a servant had bought goods on credit, having cash, Lord Ellenborough said, "If the goods were taken up, and the money given afterwards to the servant to pay, I am inclined to think the master liable, if the servant has not paid over the money; for he has given the servant authority to take up goods on credit. It is therefore material to see when the money was given. If the servant was always in cash, beforehand, to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant was not so in cash, he gave him a right to take up the goods on credit; and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant, his master." See, also, *Pearce v. Rogers*, 3 Esp. R. 214; *Gratland v. Freeman*, 3 Esp. R. 85.

⁴ *Gilman v. Robinson*, Ry. & Mood. 227.

particular business does not make it special ; it may be as general, in regard to that, as if its range were unlimited.¹ In the former case, if the agent exceeded the special and limited authority conferred upon him, the principal is not bound by his acts, unless he has held him out as possessing a more enlarged authority.² But in the latter case, the principal will be bound by all the acts of his agent, within the scope of the general authority conferred by him, although the agent should violate his private instructions. Whoever deals with a special agent is bound to acquaint himself with the limitation and extent of the authority conferred upon him, and acts at his own peril. But if the agency be general, the principal will be responsible for all acts ostensibly within the authority of the agent.³ This distinction is evidently founded in justice and good policy, for it not only prevents frauds upon third persons, but encourages confidence in dealings with agents, and facilitates commercial transactions. For if a principal hold out to the public, that his agent is possessed of a general authority to act for him, and bind him in relation to certain transactions, and, at the same time, limit such authority by secret instructions, unknown to the public, — to absolve the principal from liability, would operate as a fraud upon all who enter into contracts upon the basis of such general agency, and such a rule would render all agreement with agents insecure. Thus,

¹ *Whitehead v. Tuckett*, 15 East, 400, 408; *Paley on Agency*, by Lloyd, 2, and note, (3d ed.).

² *Gordon v. Buchanan*, 5 Yerg. R. 71; *Hoskins v. Carroll*, 7 Yerg. 505; *Devinney v. Reynolds*, 1 Watts & Serg. 328; *Landsdale v. Shackleford*, Walker, R. 149; *U. S. v. Williams*, Ware, R. 175; *Thatcher v. Bank of New York*, 5 Sandf. R. 121; *Kaye v. Brett*, 5 Exch. 269.

³ *Story on Agency*, § 126, et seq. and cases cited; 2 *Kent's Comm. Lect.* 41, p. 620, 621; *Paley on Agency*, by Lloyd, 198, 199 to 208; *Fenn v. Harrison*, 3 T. R. 757; *Pickering v. Busk*, 15 East, 45; *Helyear v. Hawke*, 5 Esp. 72, 75; *Jeffrey v. Bigelow*, 13 Wend. 518; *Schimmelpennich v. Bayard*, 1 Peters, 264; *Withington v. Herring*, 5 Bing. 442. So, also, see 1 *Pothier on Oblig.* Evans, n. 79; *Ib.* n. 447, 448; *Planters Bank v. Cameron*, 3 Smedes & Marsh. 609.

if a man send his horse to a fair by a *stranger*, instructing him to sell the horse without a warranty, he constitutes him a special agent, and if the stranger warrant, the owner will not be bound.¹ But if the servant of a horse-dealer, having a general authority to sell and warrant, do warrant in a particular case, in violation of private instructions, the master will be bound, unless he give public notice that such general authority is limited in the particular instance.² Where, therefore, a special authority was given in writing to an agent to purchase a particular tract of land, and the agent purchased another, paid therefor by cash and notes signed by him as agent, and received a deed in his principal's name, and the principal disapproved the purchase, and filed his bill to have the contract set aside, it was held, that the sale was void, the purchase having been made without authority, and that the principal was entitled to have his money refunded.³ So, also, where an agent was specially authorized to sell a ship in the same manner as the principals might have sold her, they were held not to be bound by his representations, that the ship was registered, when in fact it was a coasting vessel.⁴ But where an agent had a general power to sell lands, it was held, that his warranty was binding on the principal, a conveyance with warranty being the ordinary form in the country.⁵

¹ *Fenn v. Harrison*, 3 T. R. 757, 762; s. c. 4 T. R. 757, per Ashurst, J. See, also, on this subject, *Croom v. Shaw*, 1 Florida, 211; *Bradford v. Bush*, 10 Ala. R. 386; *Nelson v. Cowing*, 6 Hill, R. 336; *Hunter v. Jameson*, 6 Iredell, R. 252.

² *Pickering v. Busk*, 15 East, 45. See also 2 Kent, Comm. 621, Lect. 41; Story on Agency, § 132; *Fenn v. Harrison*, 3 T. R. 760; *Helyear v. Hawke*, 5 Esp. R. 72; *Taggart v. Stanberry*, 2 McLean, R. 543.

³ *Brown v. Johnson*, 12 Smedes & Marsh. 398. See, also, Mayor, &c. of Little Rock v. State Bank, 3 English, (Ark.) R. 227.

⁴ *Gibbon v. Colt*, 7 Johns. R. 390. See also *Nixon v. Hyserott*, 5 Johns. R. 58.

⁵ *Taggart v. Stanberry*, 2 McLean, R. 543; *Peters v. Farnworth*, 15 Verm. R. 155; *North River Bank v. Rogers*, 22 Wend. R. 649.

§ 135. So, also, the representations, declarations, admissions, and even concealments of an agent, constituting a part of the *res gestæ*, and being the inducement to the contract, and made at the same time, are binding upon the principal.¹ But if they be made at another time, and do not form a part of the *res gestæ*, the principal will not be bound.² For the agent can only bind the principal by such statements or concealments, in reference to the subject-matter of the contract, as he makes, or is understood to make, in his character of agent.³ Thus, the representations made by an agent at the authorized sale of a horse, in regard to the soundness of the horse, will be binding upon the principal; but his representations upon the same subject, at a different time, would not be binding, because they could not be presumed to be made by him as agent.⁴ So, also, if the agent should give a warranty, contrary to his instructions, the principal would be bound, if the agency were general.⁵ So, also, an agent employed for a special object, may use the ordinary means for accomplishing it, and if he make false representations, in the due course of such transac-

¹ Story on Agency, § 135, et seq. and cases cited; *Peto v. Hague*, 5 Esp. R. 135; *Fairlie v. Hastings*, 10 Ves. 126, 127; *Gaith v. Howard*, 8 Bing. R. 451; *Hannay v. Stewart*, 6 Watts, 489; *Helyear v. Hawke*, 5 Esp. 72; *Marsh. on Ins. B. 1*, ch. 11, § 1, p. 466; *Fillis v. Brutton*, *Ibid.* 465; *Stewart v. Dunlop*, 4 Bro. Parl. Cas. 483; *Willes v. Glover*, 4 B. & P. 14; *Doggett v. Emerson*, 3 Story, R. 700.

² *Helyear v. Hawke*, 5 Esp. R. 72; *Cornfoot v. Fowke*, 6 Mees. & Welsb. 358; *Tillotson v. M'Crillis*, 11 Verm. R. 477. But see *Graham v. Schmidt*, 1 Sandf. C. C. R. 74.

³ *Gaith v. Howard*, 8 Bing. 451; *Helyear v. Hawke*, 5 Esp. R. 72, 73; *Langhorne v. Allnut*, 4 Taunt. 511; *Betham v. Benson*, 1 Gow, R. 45; *Fairlie v. Hastings*, 10 Ves. 123; *Paley on Agency*, by Lloyd, 257, 268, 269; *Maesters v. Abraham*, 1 Esp. R. 375; *Hannay v. Stewart*, 6 Watts, R. 489; *Story on Agency*, § 137; *Doggett v. Emerson*, 3 Story, R. 700.

⁴ *Helyear v. Hawke*, 5 Esp. R. 72, 73; *Lobdell v. Baker*, 1 Metcalf, 193; *Hubbard v. Elmer*, 7 Wend. 446; *Tillotson v. M'Crillis*, 11 Verm. R. 477.

⁵ *Alexander v. Gibson*, 2 Camp. R. 555; *Cornfoot v. Fowke*, 6 Mees. & Welsb. 358; *Pickering v. Busk*, 15 East, R. 43; *Fenn v. Harrison*, 3 T. R. 760; s. c. 4 T. R. 760.

tion, the principal is bound by them.¹ And any fraud or misrepresentation, which would bind the principal, if he made it himself, will equally bind him, if made by his agent within the scope of his authority,² and in the course of his business.

§ 135 *a*. But fraudulent acts of the agent beyond the scope of his authority, and especially if they be in contravention of his duty and against the rights of his principal, will not be binding upon the principal. Where, therefore, the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had not been received, the principal was held not to be responsible.³ So, also, the representations of a professed agent, although they should form a part of the *res gestæ*, would not be available to prove the *fact* of his agency or the extent of his authority, if questioned by his principal, however publicly such declarations should be made.⁴

§ 136. On the same principle, notice to an agent, in respect to the subject-matter of his agency, is considered as notice to the principal. The notice must, however, be given to the agent, in the course of the very transaction to which it applies, or within so short a time previously, as to create the presumption, that it is in the memory of the agent, or the principal will not be bound.⁵ So, also, knowledge acquired by an

¹ Sandford *v.* Handy, 23 Wend. R. 260.

² Doggett *v.* Emerson, 3 Story, R. 700; Locke *v.* Stearns, 1 Metcalf, R. 560; Schneider *v.* Heath, 3 Camp. R. 506; Daniel *v.* Mitchell, 1 Story, R. 172; Wilson *v.* Fuller, 3 Adolph. & Ell. n. s. 72; Collins *v.* Evans, 5 Ad. & Ell. n. s. 828; Lohdell *v.* Baker, 1 Metcalf, R. 193. See Fitzsimmons *v.* Joslin, 21 Verm. R. 129; Crump *v.* U. S. Mining Co. 7 Grattan, 352.

³ See Coleman *v.* Riches, 29 Eng. Law & Eq. R. 323; and see Grant *v.* Norway, 2 Id. 337; Hubbersty *v.* Ward, 18 Id. 551.

⁴ Brigham *v.* Peters, 1 Gray, R. 145; Mussey *v.* Beecher, 5 Cush. R. 517; Tuttle *v.* Cooper, 5 Pick. R. 417.

⁵ Story on Agency, § 140; Hiern *v.* Mill, 13 Ves. 120; 1 Story on Eq. Jurisp. § 408; Hargreaves *v.* Rothwell, 1 Keen, R. 159; 2 Livermore on

agent in the course of business is the knowledge of his principal.¹

§ 137. In all cases, where an authority is conferred upon an agent, whether it be express or implied, or whether it be of a special or general nature, it is always construed to include all the necessary or usual modes and means of so executing it, as to accomplish the objects of the agency. For, to invest an agent with authority to do a certain act, and to deny him the means requisite to carry his authority into effect, would be idle and absurd. Whenever, therefore, an authority is conferred, all necessary subordinate powers accompany it.² Thus, an authority to recover and receive a debt, will confer upon an attorney the power of arresting the debtor.³ So, also, an authority to settle losses on a policy, includes a power to refer the matter to arbitration.⁴ So, also, an agent employed to procure the discounting of a note or bill, may, if necessary, or proper, indorse it in his own name, or in that of the principal.⁵ So, also, all means justified by the usages of trade, may be employed by the agent, to effect the object intended to be attained by the agency. Thus, under a general authority to sell, sales on credit may be made, if they be conformable to com-

Agency, 235, 237; *Lawrence v. Tucker*, 7 Greenl. 195; *Bracken v. Miller*, 4 Watts & Serg. 102.

¹ *Sutton v. Dillaye*, 3 Barb. Sup. Ct. R. 273.

² *Howard v. Baillie*, 2 H. B. 618; *Story on Agency*, § 58, et seq.; *Withington v. Herring*, 5 Bing. R. 442; *Rogers v. Kneeland*, 10 Wend. 218; *Peck v. Harriott*, 6 Serg. & R. 146; 1 Bell, Comm. 387, art. 412, 4th ed.; 3 Chitty on Com. and Manuf. 200. See *Pollock v. Stables*, 12 Q. B. R. 765; *Bayliffe v. Butterworth*, 1 Excheq. R. 425.

³ *Howard v. Baillie*, 2 H. B. 618, 619, 620; *Com. Dig. Attorney*, c. 15, citing *Palmer*, 394.

⁴ *Goodson v. Brooke*, 4 Camp. 163.

⁵ *Fenn v. Harrison*, 4 T. R. 177; *Nickson v. Broban*, 10 Mod. 109; *Hicks v. Hankin*, 4 Esp. R. 116; *Ex parte Robinson*, 1 Buck. 113; *Bayley on Bills*, 5th ed. ch. 2, § 7.

mon usage, or to the previous habit of dealing between the parties; but not otherwise.¹ Where an authority, although conveyed in general and unlimited terms, is conferred in relation to the particular subject-matter of the agency, it will be restricted to such subject-matter, according to the general rules of construction.² Formal instruments are generally strictly construed, and the authority conferred thereby is limited by the terms, so as to embrace only such incidental powers, as are necessary and proper, to give full effect thereto.³ Thus, a power of attorney to sell, assign, and transfer stock, will not include a power to pledge them for the agent's own debt.⁴ So, a power to bargain and sell land, will not confer an authority to grant a license to a person, to enter and cut timber on the land, though done *bonâ fide*, with a view of inducing him to buy.⁵ And a power to sell personal property does not necessarily confer a power to sign the principal's name to a contract of sale, so as to bind him under the statute of frauds.⁶

§ 138. So, also, an authority conferred by any written instrument is always restricted to those acts, which are obviously incidental and occasional to the particular subject-matter, to

¹ *Forrestier v. Bordman*, 1 Story, R. 43; *Ekins v. Macklish*, Ambler, R. 184, 185; *Paley on Agency*, by Lloyd, 3d ed. 198, note; Anon. 12 Mod. 514; *Scott v. Surman*, Willes, 407; *Houghton v. Matthews*, 3 B. & P. 489; *Newson v. Thornton*, 6 East, 17; *Goodenow v. Tyler*, 7 Mass. 136; *May v. Michell*, 5 Humph. R. 365. See *Towle v. Leavitt*, 3 Foster, 360.

² See post, § 641 to § 646.

³ *Wiltshire v. Sims*, 1 Camp. R. 258; *Patterson v. Tash*, 2 Str. 1178; *Guerreiro v. Peile*, 3 B. & Ald. 616.

⁴ *Atwood v. Munnings*, 7 B. & C. 278, 283, 284; *Ducarrey v. Gill*, 1 Mood. & Malk. 450; *Withington v. Herring*, 5 Bing. 442; *Story on Agency*, § 62, 67; *Rossiter v. Rossiter*, 8 Wend. 494; *Hogg v. Snaith*, 1 Taunt. 347; *Murray v. East Ind. Co.* 5 B. & Ald. 204, 210, 211; *Hay v. Gordsmidt*, 1 Taunt. 349; *Bott v. McCoy*, 20 Ala. 578.

⁵ *De Bouchout v. Goldsmidt*, 5 Ves. Jr. 211.

⁶ *Coleman v. Garrigues*, 18 Barb. R. 60.

which they refer.¹ Thus, where a person was authorized to superintend a farm, he was held to possess no power to sell it, or the things belonging to it.² But, if the language of an instrument be susceptible of different interpretations, and the agent be in fact misled, and adopt that one, which was not intended by the principal, the principal will, nevertheless, be bound. For he who occasions the mistake, should suffer the injury.³ Indeed, wherever an express authority is conferred by informal instruments, such as letters of advice, or instructions, which are general in their terms, and convey a general authority, the rule of construction is more liberal than that applicable to formal and deliberate instruments.⁴

§ 138 *a*. Again, a promise of indemnity to an agent for the performance of all the acts ordered by his principal, is implied from the relation of the parties; and even when he commits a trespass, he has a claim for reimbursement of all damages he thereby sustains, provided he act *bonâ fide*, without suspicion of wrong, and in pursuance of orders.⁵

§ 139. We have seen that an agency may be created by implication and presumption from circumstances, or from the acts of the parties; and where this is the case, the implied agency will be restricted to the purposes for which it was obviously created, and is limited by the general usage, course, and scope of the business, for which it was created. If it arise by im-

¹ Hubbard v. Elmer, 7 Wend. 446; Story on Agency, § 69; Kilgour v. Finlyson, 1 H. B. 155.

² Story on Agency, § 71, 78, and cases cited; Cod. Lib. 2, tit. 13, ch. 16; Pothier, Pand. Lib. 3, tit. 3, n. 4; Guerreiro v. Peile, 3 B. & Ald. 610; Patterson v. Tash, 2 Str. 1178; Wiltshire v. Simms, 1 Camp. 258.

³ See ante, Rules of Interpretation; Loraine v. Cartwright, 3 Wash. Circ. R. 151; Courcier v. Ritter, 4 Wash. Circ. R. 551; De Tastett v. Crousillat, 2 Wash. Circ. R. 132; 1 Liv. on Agency, 403; Story on Agency, § 79; Pickett v. Pearsons, 17 Verm. R. 470.

⁴ Story on Agency, § 82.

⁵ Gower v. Emery, 6 Shep. R. 79. See post, § 176.

plication from numerous acts, done by the agent with the tacit assent of the principal, it must be limited to acts of a similar nature. If it be an implied authority to do a particular act, the agency must be limited to the appropriate means of accomplishing that act only.¹ An authority is, however, to be inferred often from the nature of the business of the agent; as, if one send goods to an auction-room, or to a broker's, an implied authority to sell arises, because it is not to be supposed that they were sent there for any other purpose.² But, where such a presumption does not naturally grow out of the circumstances of the case, no such agency will be implied. Thus, if a person send his watch to a watchmaker, to be repaired, and the watchmaker sell it, inasmuch as possession of the watch does not necessarily imply either ownership or a power to sell it, the owner would not be bound by such a sale.³

§ 140. There is, however, one modification of this rule, which obtains in cases where the agency is enlarged by the necessity of the case. Whenever, therefore, extraordinary emergencies arise, requiring the agent to overstep the limits of his authority, in order to attain the object contemplated by the agency, he will be justified in assuming extraordinary powers, in consideration of the necessities of the case. Thus, although a factor be required by his orders to sell at a particular price, yet, if the goods be of a perishable nature, so that the sale is indispensable to prevent a greater loss, he will be justified in selling them. So, also, the master of a ship is, in times of necessity, invested with an added authority, exceeding his ordinary power, in respect to the ship and cargo; and in cases

¹ *Odiorne v. Maxey*, 13 Mass. 178; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; Story on Agency, § 87; 1 *Livermore on Agency*, 36 to 40; Paley on Agency, by Lloyd, 161, 162, 3d ed.

² *Saltus v. Everett*, 20 Wend. 267; *Pickering v. Busk*, 15 East, 38; 2 Kent, Comm. Lect. 41, p. 622.

³ *Pickering v. Busk*, 15 East, 38.

of great emergency, may sell them, or hypothecate the ship.¹ So, also, a supercargo is not bound to observe the exact terms of his instructions, if the interests of the owner would be thereby sacrificed, or the objects of the voyage frustrated.² The same principle applies also to cases where the agency is primarily created by necessity; as where a mere stranger, under circumstances of necessity, makes himself agent for the purpose of saving property from injury or destruction. So, also, salvors may dispose of the property saved by them, in behalf of the parties in interest, if it be of such a nature, that it cannot be kept without injury.³ So, also, if goods be exported, and the vendee, upon their arrival, refuse to receive them, and it would not comport with the interest of the vendor to have them returned, the vendee may sell them for the benefit of the vendor, and hold him liable, in an action for damages, to the amount of the difference, giving him the benefit of a sale in the foreign market.⁴

DUTIES, OBLIGATIONS, AND LIABILITIES OF AGENTS TO THEIR
PRINCIPALS.

§ 141. We now come to the *duties, obligations, and liabilities of agents to their principals*. And, first, we shall consider the proper form in which an agent should execute a contract in behalf of his principal, so as to avoid all personal responsibility thereupon. The general rule applicable to this subject

¹ *Hawtayne v. Bourne*, 7 Mees. & Welsb. 599; 2 Kent, Comm. Lect. 41, p. 614, 3d ed.; *Forrestier v. Boardman*, 1 Story, R. 43; 3 Chitty on Com. and Manuf. 218; 1 Comyn on Cont. 236; *The Gratitude*, 3 Rob. 255 to 258. See post, as to the authority of masters of vessels.

² *Forrestier v. Boardman*, 1 Story, R. 43.

³ Story on Agency, § 142; Story on Bailments, § 83, 189; Paley on Agency, by Lloyd, 28, 29, 30, and note *m*; *Kemp v. Pryor*, 7 Ves. Jr. 240; *Cornwal v. Wilson*, 1 Ves. 509, by Lord Hardwicke.

⁴ *Kemp v. Pryor*, 7 Ves. Jr. 240, 241, 242, 247, by Lord Eldon; Story on Agency, § 143; *Cornwal v. Wilson*, 1 Ves. 509, by Lord Hardwicke.

is, that the principal will neither be personally bound by a specialty signed by his agent, nor capable of suing thereupon, unless it appear on its face to be his deed, and unless it be made in his name.¹ The reason of this rule is, that the instrument would be utterly without legal effect, unless it were construed to be the deed of the agent; for parol evidence is inadmissible to contradict the manifest meaning of the terms actually used. Every instrument under seal, therefore, although it be executed by the agent, within the scope of his authority, and in behalf of his principal, will be considered as the deed of the agent. And even if an agent should commence a deed by a description of his agency, thus, "I (A. B.,) as agent of C. D., do hereby grant, sell," &c., or should sign and seal it "A. B. for C. D.," it would be considered as his own deed, and not as the deed of his principal.² But if a sealed instrument purport to be the deed of the principal, the agent is not personally bound, unless it contain apt words to bind him personally.³ The power of attorney, given by a corporation, to execute a deed, must be by vote or under the seal of the corporation, and not under that of the attorney.⁴ So, also, if a deed be made to a person through his agent, it should

¹ Story on Agency, § 147, 161, and cases cited; Com. Dig. Attorney, C. 14; 2 Kent, Com. § 41, p. 629; Combe's case, 9 Co. R. 77a; 1 Roll. Abr. Authority, p. 330, l. 37; United States v. Parmele, 1 Paine, C. C. R. 252; Clarke's Executors v. Wilson, 3 Wash. C. C. R. 560.

² Frontin v. Small, 2 Lord Raym. 1418; s. c. 1 Str. 705; Wilks v. Back, 2 East, 142; Fowler v. Shearer, 7 Mass. 14; Ellwell v. Shaw, 16 Mass. 42; s. c. 1 Greenl. 339; Copeland v. Merch. Ins. Co. 6 Pick. 198; Lutz v. Linthicum, 8 Peters, 165; Bacon v. Dubarry, 1 Lord Raym. 216; Paley on Agency, by Lloyd, 181; Appleton v. Binks, 5 East, 148; Cayhill v. Fitzgerald, 1 Wils. 28, 58; Anon. Moore, R. 70.

³ Abbey v. Chase, 6 Cush. R. 57; Stetson v. Patten, 2 Greenl. R. 358; Deling v. Cardthorn, 2 Dev. 90. And see Moor v. Wilson, 6 Foster, R. 332.

⁴ Bank of Columbia v. Patterson's Adm. 7 Cranch, 299-305; Damon v. Inhab. of Granby, 2 Pick. 345; Tippetts v. Walker, 4 Mass. R. 595. A deputy may, however, do an act, and sign his whole name, and yet bind his principal; for the deputy in law has the whole power of the principal, which the agent has not. Parker v. Kett, Salk. 95; Craig v. Radford, 3 Wheat. 594.

be made to the principal by name.¹ Yet if the name of the principal be inserted in the body of a specialty as grantor, and also be subscribed by the agent in connection with his own name, it will be sufficient. But it is not a valid execution of a deed by an agent, to affix merely the name of the principal, without adding some words to indicate that it was done by an agent.² The proper mode of subscribing an instrument, as agent, is to sign the name of the principal first, (A. B.) and then to add, "by his attorney," or "by his agent," (C. D.)³ Unless the deed purport on its face to be the deed of the principal, it will be considered as the deed of the agent, if his name be first signed; upon the ground, that whatever follows the name first signed is mere description or identification of the person bearing it, and not intended as a limitation of his liability.

§ 142. This rule, however, only applies to instruments under seal, and does not extend to instruments not under seal.⁴ In all cases of parol contracts, especially if they be maritime or commercial contracts, which are generally carelessly and loosely drawn, the intention of the parties constitutes the rule of interpretation, whenever it can be deduced from the consideration of the whole instrument.⁵ Thus, where a note began, "I promise," and was signed, "Pro C. D., A. B.;" it was held to bind the principal.⁶ And a bond so

¹ 1 Stair. Inst. by Bodie, B. I. tit. 12, § 16; Story on Agency, § 151.

² Wood v. Goodridge, 6 Cush. R. 117.

³ Wilks v. Back, 2 East, 142.

⁴ Bacon, Abr. Leases for Years, 1940; Com. Dig. Attorney, C. 14; Combe's case, 9 Co. R. 77.

⁵ Story on Agency, § 154, and cases cited; N. E. Mar. Ins. Co. v. De Wolf, 8 Pick. 56; Stackpole v. Arnold, 11 Mass. 27; Hewler v. Miller, 5 B. Munroe, R. 612; Rogers v. March, 33 Maine, 106.

⁶ Long v. Colburn, 11 Mass. 97. See also Pentz v. Stanton, 10 Wend. 271; Emerson v. Prov. Manuf. Co. 12 Mass. 237; Ballou v. Talbot, 16 Mass. 461; Mann v. Chandler, 9 Mass. 335; Hills v. Bannister, 8 Cow. 31; Barker v. Mechanics Fire Ins. Co. 3 Wend. 94; Mott v. Hicks, 1 Cow. 515; Brock-

signed was also held not to be personally binding on the agent.¹ So, also, where A., being a duly authorized agent, wrote on a note, "By authority from B., I hereby guarantee the payment of this note," and signed his own name; it was held to be the guaranty of the principal and not of the agent.² And, where A., as agent, signed a receipt, "for the owners," he was held not to be personally liable.³ So, also, where there is only a verbal contract, the agent will not be personally liable, if he inform the party, with whom he deals, of his agency. Thus, where the defendant employed the plaintiff, who was a paper-hanger, to do a job at Tippell's house, and informed him that it was on Tippell's account; it was held that the defendant was not chargeable with the price of the work.⁴

§ 143. There is, however, one modification to this doctrine, which obtains whenever it does not clearly appear, from the terms or the nature of the contract, that the agent intended to assume no personal responsibility; and, in such case, he will be personally liable, whether the instrument be sealed or not. The reason of this rule is, that it being perfectly competent for an agent to assume any personal responsibility, he must be presumed to have intended to bind himself, unless the terms of the instrument be expressive of a different intention.⁵ Thus,

way *v.* Allen, 17 Wend. 40. See also *Ex parte Bulkley*, 14 Mees. & Welsb. 473. In this case, one of several partners signed a bill, "For John Clarke, Richard Mitchell, Joseph Phillips, and Thomas Smith," and it was held that the firm were liable. The case of *Hall v. Smith*, 1 Barn. & Cres. 407, in which a different doctrine was held, is therein expressly overruled. See also Mr. Justice Story's remarks on *Hall v. Smith*, Story on Partnership, § 143.

¹ *Grubbs v. Wiley*, 9 Smedes & Marsh. 29.

² *N. E. Man. Ins. Co. v. De Wolf*, 8 Pick. 56; *Passmore v. Mott*, 2 Binn. R. 201. See also *Wiley v. Shank*, 4 Blackf. R. 420.

³ *Waddle v. Mordecai*, 3 Hill, S. C. 22. See also *Ex parte Bulkley*, 14 Mees. & Welsb. 473.

⁴ *Owen v. Gooch*, 2 Esp. R. 567.

⁵ *Paley on Agency*, by Lloyd, ch. 6, § 1, p. 378, 402; *Stackpole v. Arnold*,

where a committee of a town, being authorized to build a bridge, made an agreement for the work, headed, "agreement between" K., S., and H., "committee of the town of" W., and therein the committee promised to pay, it was held, that the committee intended to bind themselves, and that they were personally responsible.¹ So, also, where a president of an incorporated company, having authority to sign notes, signed one by which he promised to pay, it was held that he was liable upon his personal engagement, although he described himself as the president of such company.² And where the solicitors or the assignees of a bankrupt gave an agreement in these terms, "We, as solicitors, &c. do hereby undertake to pay," it was held that they were personally bound.³ The principal will, however, be by no means exonerated, although he be unknown at the time of making the contract, unless the act done be actually beyond the scope of the agent's authority, or unless exclusive credit be given to the agent.⁴ Of course, where one executes an instrument in the name of another, assuming to be his agent, but having in fact no authority so to act, he is himself responsible.⁵

§ 144. This modification is not, however, very extensive in its operation; for, whatever may be the terms of a parol con-

11 Mass. 27, 29; *Leadbitter v. Farrow*, 5 M. & S. 345; *Kennedy v. Gouveia*, 3 Dowl. & Ryl. 503; *Stevens v. Hill*, 5 Esp. 247; 2 Kent, Comm. Lect. 41, p. 630, 631, 3d ed.; *Story on Agency*, § 155; *Appleton v. Binks*, 5 East, 148; *Cayhill v. Fitzgerald*, 1 Wills, 28, 58; *Cass v. Ruddle*, 2 Vern. 280; *Norton v. Herron*, Ry. & Mood. 229; s. c. 1 Car. & Payne, 648; *Duvall v. Craig*, 2 Wheat. 45; *Higgins v. Senior*, 8 Mees. & Welsb. 490; *Savage v. Rix*, 9 N. Hamp. R. 263; *Tanner v. Christian*, 29 Eng. Law & Eq. R. 103.

¹ *Simonds v. Heard*, 23 Pick. R. 120.

² *Barker v. Mechanics Bank*, 3 Wend. R. 94.

³ *Burrell v. Jones*, 3 Barn. & Ald. 47. See also *Norton v. Herron*, 1 Carr. & Payne, 648; *Eaton v. Bell*, 5 Barn. & Ald. 24.

⁴ *Higgins v. Senior*, 8 Mees. & Welsb. 834; *Trueman v. Loder*, 11 Adolph. & Ell. 589.

⁵ *Palmer v. Stephens*, 1 Denio, R. 471.

tract, made within the scope of his authority, he will not be personally liable, if he can show clearly, that exclusive credit was given to his principal. Unless this fact can be made out, however, the party contracting with an agent by parol, may sue him primarily, if he be bound by the form of his contract. Thus, a policy of insurance made by an agent in his own name, though for the benefit of the principal, will be considered as the contract of each party.¹

§ 145. Where, however, the situation and business of the agent indicate, that he is contracting in behalf of another person, and not on his own account, and particularly where an agency is avowed, although the name of the principal be not disclosed; the common law will create a responsibility on the part of the principal, although the contract contain no mention of him. Thus, where factors or brokers, whose whole business is that of agency, purchase goods for their principal in their own name, by written contract, the principal will be bound immediately, so that he may sue and be sued thereon.² So, also, where the master of a ship makes a written contract for repairs, it will be considered as the several contract of both the master and the owner.³ The same exception also governs in the case of a bottomry bond entered by the master of a ship, and made in his own name.⁴ And a charter-party, or bill of lading, made by the master, and signed in his own

¹ *Wolff v. Horncastle*, 1 B. & P. 323; *Lucena v. Crawford*, 3 B. & P. 98; *De Vignier v. Swanson*, 1 B. & P. 346, n.; *Bell v. Gilson*, 1 B. & P. 343; *Marsh, on Ins.* 131, ch. 8, p. 311, 312, 2d ed.

² *Story on Agency*, 151, 162, and cases cited; *Paley on Agency*, by Lloyd, 207, 208; 1 *Bell, Comm.* 212, 385, 386, § 408, 409, 410, 4th ed.; 2 *Kent, Comm. Lect.* 41; *Atkins v. Amber*, 2 Esp. 493; *Snee v. Prescott*, 1 Atk. 248; *Morris v. Cleasby*, 4 M. & Sel. 560; *Paley on Agency*, by Lloyd, ch. 2, § 2, p. 111, note 3, ch. 4, § 1, p. 324.

³ *Abbott on Shipp.* pt. 2, ch. 3, § 1, 2, 3, ed. 1829; *Janus v. Bixby*, 11 Mass. 36; *Ingersoll v. Van Bokkelen*, 7 Cow. 670.

⁴ *Abbott on Shipp.* pt. 2, ch. 2, § 1, 2, 3, 4, 5, 6, 7, 8; 3 *Kent, Comm. Lect.* 40, p. 161, 162, 163, 3d ed.; 1 *Bell, Comm.* § 440-466, 4th ed.

name, in the usual course of the employment of the ship, will bind the owner; and although the owner cannot be sued directly upon such bond or charter-party, because it is not his deed, he is, nevertheless, bound by it.¹ Indeed, generally, when an agent contracts in his own name, he only adds his own personal responsibility to that of his principal, wherever the principal would be bound, if the *form* only of the contract were different.² In such cases, the equitable doctrine supersedes the strict rules of the common law. And wherever an agent has contracted within the scope of his authority, and the contract would not be binding upon the principal at law, it will be enforced in a court of equity.³

§ 146. But if a contract expressly state the agency of the party on the face of it, he will not incur any personal liability thereupon, unless he acted without authority. Nor is it necessary that there should be an express declaration of agency in the contract, if it clearly appear from the general context of the instrument, that he is dealing as agent, and does not intend to assume personal responsibility thereon.⁴ Thus, where Richard Mitchell signed a note of hand, promising to pay a sum of money "for John Clarke, Richard Mitchell, Joseph Phillips, and Thomas Smith," and it appeared that he was the agent of Clarke, Phillips, and Smith, it was held that he could not be sued alone upon the note, but that all the four per-

¹ Abbott on Shipp. pt. 2, ch. 2, § 5; *Blood v. Goodrich*, 9 Wend. 68; 1 Liverm. on Agency, ch. 2, § 3, p. 35, 36; 3 Kent, Comm. Lect. 46, p. 162, 163, 3d ed.; *Gardiner v. Lachlan*, 8 Sim. R. 126, 128; *Meyer v. Barker*, 6 Binn. 234; *Shack v. Anthony*, 1 M. & S. 573.

² *Hopkins v. Lacouture*, 4 Miller, La. R. 64; *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326; *Higgins v. Senior*, 8 Mees. & Welsb. 844; *Beebee v. Roberts*, 12 Wend. 413.

³ *Clark's Executors v. Riemsdyk*, 9 Cranch, 143; s. c. 1 Gall. 630; *Story on Agency*, § 162.

⁴ *Downman v. Jones*, 14 Law Jour. N. S. 228; 4 Adolph. & Ell. 235, n.; *Amos v. Temperley*, 8 Mees. & Welsb. 805; *Ex parte Buckley*, 14 Mees. & Welsb. 469; *Gaby v. Driver*, 2 Younge & Coll. 555; *Spittle v. Lavender*, 5 Moore, R. 270; *Owen v. Gooch*, 2 Esp. R. 567.

sons should have been made parties.¹ So, also, where an auctioneer, in the sale of an estate, made the following memorandum, "I, E. Driver, as agent for the vendor, hereby agree to sell to the above-named R. H. Gaby, &c.," it was held, in an action brought against the auctioneer, on account of the default of the vendor to deliver an abstract of title, that the agent was not personally liable.² So, also, although the written contract contain no expression of agency, yet if the letters or papers previous to the contract clearly indicate that the party is contracting as agent, and assumes no personal liability, he will only be liable as agent.³

§ 147. Where an authority is coupled with an interest in the property itself, it will bind the principal although it be executed in the name of the agent.⁴ Thus, where a factor has the legal title to property, subject to the equitable title of the owner, and where he is authorized to sell in his own name, he may so sell it, and pass the legal title.⁵ The same rule applies to cases where there is an authority coupled with an interest in mortgages, and other conveyances of real and personal property to the grantee, and the grantee is authorized to sell under certain circumstances.⁶

§ 148. Having already considered the form, which is necessary in the execution of an authority, we next come to the consideration of the *actual execution* of it. The general rule is,

¹ Ex parte Buckley, 14 Mees. & Welsb. 469.

² Gaby v. Driver, 2 Younge & Coll. 555. See also Spittle v. Lavender, 5 Moore, R. 270.

³ Downman v. Jones, 14 Law Jour. N. S. 228; 4 Adolph. & Ell. 235, n.

⁴ Hunt v. Rousmaniere, 2 Mason, 244; S. C. 3 Mason, 294; S. C. 8 Wheat. 174; S. C. 1 Peters, 1.

⁵ Coates v. Lewes, 1 Camp. 444; Baring v. Corrie, 2 B. & A. 137; Martini v. Coles, 1 M. & S. 140, 147; Pickering v. Busk, 15 East, 38; Story on Agency, § 164.

⁶ Hunt v. Rousmaniere, 2 Mason, 244; 3 Mason, 293; 8 Wheat. 174; 1 Peters, 1.

that no act or contract by an agent, however proper in form, is binding upon his principal, unless it be within the limits of his authority. He is, therefore, bound to observe the exact instructions of his principal; and if his act or contract vary materially therefrom, in nature, extent, or degree, it will not be binding upon the principal, whether the variation be beneficial or not; for the question is, whether the agent has done his duty strictly, and not whether he has acted with good motives. If, therefore, an agent, who is authorized to do an act conditionally, do it absolutely, the principal will not be bound. So, also, if he be commissioned to buy an entire thing, and he buy a part of it only, the purchase will not be binding on him. But a trifling variation from the terms of his agency, will not absolve the principal from liability.¹

§ 149. If the agent exceed his authority, by doing something cumulative and additional to the complete execution of his power, the principal will be liable for all, except such unauthorized excess. But where the power is imperfectly executed, and the rightfully executed part cannot be separated from the excess, the principal is absolved from all liability.² Thus, if an agent were empowered to procure insurance upon a ship for two thousand dollars, and he should procure a policy for two thousand dollars on the ship, and two thousand dollars additional on the cargo, the principal would be bound by the policy on the ship, and not by the policy on the cargo; unless under

¹ Story on Agency, § 165, 175, 176, 192; *Ure v. Currell*, 16 Martin, 502; *Manella v. Barry*, 3 Cranch, 415; *Co. Litt.* 258 *b.*; *Paley on Agency*, by Lloyd, 29; *Howard v. Baillie*, 2 H. B. 623; 2 Kent, Comm. Lect. 41, 618.

² Story on Agency, § 166; 1 Story, Eq. Jur. § 96, 177, and note; Sugden on Powers, 3d ed. ch. 5, per tot. and especially § 8; Harg. note to *Co. Litt.* 258 *a.*; *Bright v. Boyd*, 1 Story, R. 487; *Zouch v. Woolston*, 2 Burr. 1146; *Alexander v. Alexander*, 2 Ves. 644; Comm. Dig. Attorney, C. 15; 1 Liverm. on Agency, ch. 5, § 1, p. 101, 102; *Campbell v. Leach*, Ambl. R. 740; *Jenkins v. Kemishe*, Hard. R. 395; *Roe v. Prideaux*, 10 East, 158; Dig. Lib. 17 tit. 1, l. 33.

special circumstances.¹ But, if an agent being authorized to sign a note for six months, should sign it for sixty days, it would be utterly void against the principal.² So, where an agent is authorized to buy a certain quantity of goods, he will not be bound to purchase the exact quantity, if it be divisible, or if the quantity do not go to the essence of the contract. Thus, if an agent, being authorized to buy a hundred bushels of corn, at a certain price, should buy two hundred, the principal would be liable for the one hundred. So, also, if in such case, the agent should buy only fifty, being unable to procure more at the price at which he was limited, the principal would be bound thereby, unless the exact quantity were of the essence of the contract. But, if the authority were to purchase the fee of a certain estate, and the agent should purchase a part of it, or a life interest in it, the principal would not be bound; because the entirety, or the nature of the estate, would form an essential consideration of the purchase.³

§ 150. Where an agent is authorized to receive payment of a debt, he is bound to receive the whole of such payment in money; unless he have a special authority to receive payment in a different mode; or unless such authority is to be inferred from circumstances;⁴ or from usage; as in the case of factors, who are allowed by usage to sell on credit.⁵

§ 151. An agent is bound to exercise only ordinary diligence, and reasonable skill; and he is responsible only for such injuries as arise from a want thereof.⁶ Ordinary diligence is that

¹ 1 Liverm. on Agency, ch. 5, § 1, p. 101, 102; Story on Agency, § 169, 170.

² Batty v. Carswell, 2 Johns. R. 48.

³ 2 Kent, Comm. Lect. 41, p. 618.

⁴ Barker v. Greenwood, 2 Younge & Coll. 419, 421.

⁵ 4 Chitty on Com. and Manuf. 199; Story on Agency, § 108, 110, 209. See post, Factors.

⁶ Evans v. Potter, 2 Gall. R. 13.

diligence which persons of common prudence use in the conduct of their own affairs. Reasonable skill is the average skill possessed by persons of common capacity, employed in the same business.¹ The mere fact, that an agent has sold or let property at an undervalue, will not make him responsible, if it appear that he acted in entire good faith.²

§ 152. Every agent is bound to execute the incidental orders and instructions of his principal, whenever, for a valuable consideration, he has undertaken to perform certain offices or duties out of which they spring. Nor does it matter, whether such orders or instructions be expressly given, or arise from implication, either from the habits of the parties in their previous intercourse, or from the general usage of trade.³ Thus, an agent having the goods of his principal in his hands, is bound to insure them in three instances. First, where there is a positive order. Secondly, wherever the usage or trade, or the previous habit of dealing between the parties creates an implied obligation to insure them; although there be no special order in the particular case. Thirdly, where a merchant abroad sends bills of lading to his correspondent here, and ingrafts thereupon an order to insure, as the implied condition, on which the bills of lading are to be accepted, the agent is bound to obey, if he accept them.⁴ In these three

¹ Story on Bailments, § 431, 432, 433, 434; Jones on Bailments, 94, 98, 99; *Denew v. Daverell*, 3 Camp. 451; *Leave v. Prentice*, 8 East, 348; *Simpson v. Swan*, 3 Camp. 291; *Maderia v. Townsley*, 12 Martin, 365; *Dartnall v. Howard*, 4 B. & C. 345; Story on Agency, § 183, and cases cited; *Leverick v. Meigs*, 1 Cowen, R. 645. The same rule prevails in regard to diligence, in the Roman law, the Scotch law, and the French law. Heinec. Elem. Inst. Lib. 3, tit. 14, § 788; Id. Pand. Lib. 17, tit. 1, § 233; Pothier, Œuvres, edit. 1681, 4to, p. 455; Ersk. Inst. B. 3, tit. 1, § 21; Id. tit. 3, § 36; Bell, Com. § 411, p. 387.

² *Dyas v. Cruise*, 2 Jones & Lat. 460.

³ Story on Agency, § 189, et seq.

⁴ *Smith v. Lascelles*, 2 T. R. 189; Marsh. on Insurance, B. 1, ch. 8, p. 269, 297; 1 Liverm. on Agency, ch. 8, § 1, p. 323, 325, 326; *Morris v. Summerl*,

instances, the agent will render himself responsible for all losses and injuries, growing out of the omission to insure. But, unless something have been held out by the agent to the principal, to induce the belief, that he will procure insurance, he will not be compelled to insure.¹

§ 153. Wherever any duties grow reasonably out of the orders of the principal, so that a proper attention to the facts stated therein, or to the condition or situation of the property, would have induced persons of reasonable skill to perform such duties, the agent will be responsible for any loss arising from his neglect.² Thus, where A., being an insurance broker, was employed by B. to insure goods for a part of a voyage from Malaga to Dublin, namely, from Gibraltar to Dublin, B. intending to take the risk of the preceding portion of the voyage on himself, and A. effected an insurance on goods, "at and from Gibraltar to Dublin, beginning the adventure from the loading thereof on board at Gibraltar," and the vessel was lost after leaving Gibraltar; it was held, that if A. had paid a proper attention to the facts, he would have known that the goods were to be laden at Malaga; and that he was therefore liable for his negligence in insuring goods to be laden at Malaga; no goods having, in fact, been laden at the latter port.³

§ 154. Whenever the agent receives instructions, he must comply with them faithfully, unless they be either unlawful, or unless some sudden and unforeseen emergency arise, not

2 Wash. Circ. R. 203; s. c. Marsh. on Ins. Cond. note to p. 301; Paley on Agency, by Lloyd, 18; 1 Phillips on Ins. ch. 22, p. 519 to 524; Wallace v. Telfair, 2 T. R. 188, note; Story on Agency, and cases cited; Moore v. Mourgue, Cowp. 479; Comber v. Anderson, 1 Camp. 523.

¹ Smith v. Lascelles, 2 T. R. 189.

² Park v. Hammond, 6 Taunt. 495; s. c. 4 Camp. 341; Mallough v. Barber, 4 Camp. 150; Fomin v. Oswell, 3 Camp. 357; 1 Liverm. on Agency, 352, 372, 373, 374; Paley on Agency, by Lloyd, 18.

³ Park v. Hammond, 6 Taunt. R. 495; s. c. 4 Camp. R. 341.

contemplated in such instructions; in which case, if strict adherence to them would either operate as an injury, and frustrate the intention of the principal, or would be impossible, he will be excused therefrom.¹ But in all other cases, he must obey his instructions; and although the act, done in violation thereof, be intended for the benefit of the principal, it will not excuse him. Every loss, growing out of a non-compliance with his orders, must be borne by him personally, and all the profit accruing therefrom enures to the benefit of the principal. But, if the main object of the orders be attained, without any additional expense or risk, a slight and unimportant deviation from their literal terms, will not subject the agent to liability. Thus, if an agent be limited to a certain price for the purchase of goods, and he exceed it, but make up such excess by a saving in some other part of the same business, as in the expense of shipping them, he would be excused; at least in equity.²

§ 155. Where the agent receives no instructions, he must conform to the usage of trade or the custom applicable to the particular agency; and any deviation therefrom, unless it be justified by the necessity of the case, will render him solely liable for all the loss or injury resulting from it.³ Thus, if an agent should sell upon credit, when the usage was to make such sales for cash; or should omit to present notes taken by him, for payment; or should allow further time for the pay-

¹ *Catlin v. Bell*, 4 Camp. 113; *Dusar v. Perit*, 4 Binn. 361; *Chitty on Com. and Manuf.* ch. 3, p. 218; *Story on Agency*, § 193-197.

² *Cornwall v. Wilson*, 1 Ves. 519; *Smith on Merc. Law*; 3 *Chitty on Com. and Manuf.* ch. 3, p. 219, note 1; *Story on Agency*, § 85, 198.

³ *Story on Agency*, § 96, 185, 199; 3 *Chitty on Com. and Manuf.* ch. 3, p. 215, 216; *Young v. Cole*, 3 Bing. N. C. 724; *Belchier v. Parsons*, Ambler, 219, 220; *Russell v. Hankey*, 6 T. R. 12; *Caffrey v. Darby*, 6 Ves. 496; *Massey v. Banner*, 1 Jac. & Walk. 241, 258; *Moore v. Mourgue*, Cowp. 480; *Smith v. Cologan*, 2 T. R. 188, note a; *Warwick v. Noakes*, Peak, R. 68; *Paley on Agency*, by Lloyd, 9, 10, 21, 45, 46, 47, 204, 205, 209, 3d ed.; 2 *Kent, Comm. Lect.* 41, p. 622 to 624, 3d ed.

ment of them, after they become due; he would be personally responsible.¹ So, also, the same rule would apply, if in insuring goods, he should omit the usual clauses inserted in a policy, and a loss should occur, which would have been covered by such clauses.² So, also, if, following the usage, he should appoint a sub-agent, the sub-agent would in like manner be responsible to the principal or agent for reasonable diligence and skill. But, if the agent used reasonable diligence in appointing him, he would not be responsible for the sub-agent's neglect or fraud.³ Yet, if the compliance with such usage would, in a particular case, be injurious to the interests of his principal, he will not only not be bound to comply with it, but if he do, knowing that it will be productive of injurious results, he will render himself personally liable therefor.⁴ Thus, if an agent should store the goods of his principal in a place, which he knew to be dangerous and improper, he would not be justified, although similar goods were usually stored in similar places.

§ 156. An agent is also bound to keep regular accounts and vouchers of all transactions occurring in his agency; and if any loss accrue, through his neglect so to do, he will be liable therefor in equity.⁵ So, also, an agent must keep his own prop-

¹ *Littlejohn v. Ramsay*, 16 Martin, 655; *Gilly v. Logan*, 14 Martin, 196; *Hosmer v. Beebe*, 14 Martin, 368; *Richardson v. Weston*, 16 Martin, 244; *Leverick v. Meigs*, 1 Cow. 646; *Caffrey v. Darby*, 6 Ves. 494; 1 *Liverm. on Agency*, ch. 8, § 2, p. 368; *Ibid.* 354.

² *Mallough v. Barber*, 5 Camp. 150. See also *Comber v. Anderson*, 1 Camp. 523; *Park v. Hamond*, 4 Camp. 344; s. c. 6 Taunt. R. 495; *Walker v. Smith*, 4 Dall. 389.

³ *Mainwaring v. Brandon*, 8 Taunt. 202, 204; *Bromley v. Coxwell*, 2 Bos. & Pul. 438; *Cochran v. Irlam*, 2 M. & S. 301; *Goswill v. Dunkley*, 2 Str. R. 681; *Paley on Agency*, by Lloyd, 17, 20; 1 *Liverm. on Agency*, ch. 2, § 4, p. 56 to 67; *Story on Agency*, 201, and note 2.

⁴ *Sadock v. Burton*, Yelv. 202; *Anon.* 12 Mod. 514; *Chitty on Com. and Manuf.* ch. 3, p. 215, 216, 218, note 1; 2 *Molloy*, B. 3, ch. 8, § 5; *Story on Agency*, § 199.

⁵ *White v. Lady Lincoln*, 8 Ves. 363; s. c. 15 Ves. 441; *Chedworth v. Ed-*

erty distinct from that of his principal; for if, through his negligence, he be unable to distinguish one from the other, the whole will be considered as the property of the principal, as a species of penalty for his negligence.¹ Thus, if an agent should deposit funds belonging to his principal in a bank, in his own name, and without any mark to distinguish them as belonging to his principal, and the bank should become insolvent, he would be liable for the loss.² All the profits made by an agent in the course of his agency, whether incidental or direct, enure to the benefit of his principal. No agent can appropriate any incidental profit arising therein, although he be justified in so doing by usage; for such usage is considered a usage of fraud and plunder. Thus, if an agent have made interest on his principal's money in his hands, he will, in general, be obliged to account for it.³ He is, therefore, restricted to a proper compensation; and the profits, however they may accrue, must be passed to the credit of the principal.⁴

§ 157. When a factor guarantees payment on a sale, in consideration of an additional recompense, he is said to receive a *del credere* commission, and in such case, upon failure of payment by the purchaser, he himself becomes liable personally.

wards, 8 Ves. 49; Paley on Agency, by Lloyd, 48, 49; 1 Story on Eq. Jurisp. § 468, 623; 1 Liverm. on Agency, ch. 8, § 7, p. 434 to 436; Smith on Merc. Law, 94.

¹ Fletcher v. Walker, 3 Mad. R. 73; Wren v. Kirton, 11 Ves. 379, 382; Lupton v. White, 15 Ves. 432; Paley on Agency, by Lloyd, 48, 49, 51; 1 Beawes Lex Merc. Factors, p. 44, 46; Chedworth v. Edwards, 8 Ves. 49; 3 Chitty on Com. and Manuf. ch. 3, p. 215, 220; Story on Agency, § 205.

² Caffrey v. Darby, 6 Ves. 496; Massey v. Banner, 1 Jac. & Walk. 241; 4 Madd. R. 413; Wren v. Kirton, 11 Ves. 377, 382; Macdonnell v. Harding, 6 Sim. R. 178; Darke v. Martyn, 1 Beav. R. 526; Fletcher v. Walker, 3 Mad. R. 73.

³ Rogers v. Boehm, 2 Esp. R. 704.

⁴ Story on Agency, § 207; 3 Chitty on Com. and Manuf. ch. 3, p. 216, 221; Diplock v. Blackburn, 3 Camp. R. 43; Massey v. Davies, 2 Ves. Jr. 317; — v. Jolland, 8 Ves. 72; Paley on Agency, by Lloyd, 3, 4; Smith on Merc. Law, 94.

But an agent under such a commission is only understood to guarantee the payment of the money by the purchaser, and not the safe remittance of it to the hands of the principal.¹

§ 158. Whenever an agent violates his duties and obligations to his principal, and loss accrues, either directly or indirectly, as a consequence of his neglect or misconduct, he will be liable to his principal. Thus, if an agent should knowingly deposit goods in an improper place, and they should be destroyed there by fire, he would be responsible for the loss, although it were the direct consequence of the fire and not of his negligence.² So, if an agent neglect to procure insurance when he is bound to do so, he is responsible for any direct consequence, entailing a loss.³ But although it is not necessary that such a loss should be the immediate result of such misconduct, yet it must actually have resulted therefrom, and not be merely a possible or probable result thereof.⁴ Thus, although an agent be ordered to make sales on a certain credit, and he actually makes them on a longer credit, and yet before the period allowed by the orders elapse, the vendee fail, the agent would not be responsible, because the loss would have occurred if he had obeyed his instructions.⁵ But if a voyage be properly insured and the ship deviate therefrom, or if the ship be lost by a risk, which would not have been covered by a policy made in accordance with the order, or if the insurance

¹ *Leverick v. Meigs*, 1 Cow. 645; *Henback v. Mollman*, 2 Duer, 253. But see *Mackenzie v. Scott*, 6 Bro. Parl. Cas. by Tomlin, 286; 1 *Liverm. on Agency*, 408 to 411; *Lucas v. Groning*, 7 Taunt. 164; *Story on Agency*, § 215.

² *Paley on Agency*, by Lloyd, 10, 19, 20, 21, 75, 76; *Caffrey v. Darby*, 6 Ves. 496; *Davis v. Garret*, 6 Bing. R. 716.

³ *Wallace v. Tellfair*, 2 T. R. 188, note; *Smith v. Lascelles*, 2 T. R. 186; *Delancy v. Stoddart*, 1 T. R. 24; *Morris v. Summerl*, 2 Wash. Circ. R. 203; *De Tasset v. Crousillat*, 2 Wash. Circ. R. 132, 136; *Parker v. James*, 4 Camp. R. 112.

⁴ *Story on Agency*, ch. viii. per tot. and cases cited.

⁵ *Paley on Agency*, by Lloyd, 19, 20, 21, 74, 75; *Story on Agency*, § 222.

be illegal, the agent would not be liable, although he should violate or neglect his orders.¹

DEFENCES OF AGENTS AGAINST THEIR PRINCIPAL.

§ 159. In the next place, as to the *Defences of Agents against their Principals*. — If an agent conform to all his duties, as stated in the foregoing chapter, he will not be responsible to his principal for any losses accruing from his agency.² So, also, although he do not exactly comply with his instructions, yet if his deviations therefrom be justified by the necessity of the case; as where a literal compliance therewith would have frustrated the object of the agency, and been injurious to the interest of his principal;³ or if the subject-matter of his agency be founded in immorality, illegality, or fraud, or contravene the principles of public policy;⁴ or if his neglect or violation of his duties and instructions do not occasion the loss or injury actually sustained; or if the instructions were so given as to have misled him;⁵ he will not be responsible therefor. In every case there must be both an injury and a wrong, in order to sustain an action thereupon, and *damnum absque injuria*, or *injuria absque damno* are perfect defences.⁶

¹ Marsh. on Ins. B. 1, ch. 8, § 2, p. 300; *Delaney v. Stoddart*, 1 T. R. 22; *Webster v. De Tastet*, 7 T. R. 157; Paley on Agency, by Lloyd, 74, 75, 76; *Smith v. Lascelles*, 2 T. R. 186; *Marzetti v. Williams*, 1 Barn. & Adolph. 415.

² See Story on Agency, ch. ix. per tot.

³ *Dusar v. Perit*, 4 Binn. R. 361; *The Gratitude*, 3 Rob. R. 240, 257.

⁴ *Bexwell v. Christie*, Cowp. 395; *Webster v. De Tastet*, 7 T. R. 157; *Simpson v. Nichols*, 3 M. & W. 240; 1 Story on Eq. Jurisp. § 296, 308; 1 Liverm. on Agency, ch. 1, § 2, p. 14 to 22; *Thomson v. Thomson*, 7 Ves. 470; *Cannan v. Bryce*, 3 B. & Ald. 179; *Langton v. Hughes*, 1 M. & S. 593; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; *Edgar v. Fowler*, 3 East, 222; *Bryan v. Lewis*, 1 Ry. & Mood. 386.

⁵ *Pickett v. Pearsons*, 13 Verm. R. 470.

⁶ Paley on Agency, by Lloyd, 19, 20, 21, 75, 76; *Delaney v. Stoddart*, 1 T. R. 22; *Webster v. De Tastet*, 7 T. R. 157.

§ 160. The most complete and important defence, however, which can be made by an agent, is, that the principal has ratified his acts and omissions; for a subsequent sanction has the same effect as a prior order. The maxim of the common law is, "*omnis ratihabitio retrotrahitur et mandato æquiparatur*;" and a ratification, when once made deliberately, becomes instantly obligatory, and cannot be afterwards revoked.¹

§ 161. A ratification must, however, be made with a full knowledge of all the facts and circumstances, or it will not be obligatory on the principal, although such facts or circumstances may have been innocently concealed, or inadvertently misrepresented.² Where the agent acts in the name of his principal by an instrument under seal, the general rule is, that the ratification should also be under seal.³ Yet if the agent should affix a seal to his contract when none was necessary, a parol ratification would render the contract binding as a simple contract.⁴ But when the contract by the agent is not under seal, it is not necessary that the ratification should be express and formal, but it may arise by implication from collateral circumstances, from the acts of the principal, or the habits of dealing between the parties, and even from his silence and acquiescence, when it was incumbent on him to object, or when

¹ *Smith v. Cologan*, 2 T. R. 189, note; *Clarke's Ex'rs v. Reimsdyk*, 9 Cranch, R. 153; *Bigelow v. Dennison*, 23 Verm. R. 565; *Moss v. Rassie Lead Mining Co.* 5 Hill, R. 137.

² *Story on Agency*, § 239, and cases cited; *Wolff v. Horncastle*, 1 B. & P. 320, 324; *Copeland v. Merch. Ins. Co.* 6 Pick. 198; *Conn v. Penn*, 1 Pet. Circ. R. 496; *Horsfall v. Fauntleroy*, 10 Barn. & Cress. 755; *Bell v. Cunningham*, 3 Peters, R. 69, 81; *Lazarus v. Shearer*, 2 Alab. R. 718; *Freeman v. Rosher*, 13 Q. B. Rep. 780; *Penn. Del. etc. Navigation Co. v. Dandridge*, 8 Gill & Johnson, 248.

³ *Bloodgood v. Goodrich*, 9 Wend. 68; s. c. 12 Wend. 525; *Hanford v. McNair*, 9 Wend. 54; *Story on Agency*, § 49, 342, 252; *Despatch Line of Packets v. Bellamy Man. Co.* 12 N. Hamp. R. 285.

⁴ *Worrall v. Mann*, 1 Selden, R. 229; *Mitchell v. St. Andrews Land Co.* 4 Florida, R. 200. But see *Wheeler v. Nevins*, 34 Maine R. 54; *Baker v. Freeman*, 35 Maine R. 485.

the presumption of a ratification is the only satisfactory explanation of such a silence.¹ Thus, where A. & B. being jointly interested in a quantity of oil, A. entered into a written contract for the sale of it, without B.'s permission, who refused, at first, to be bound by it; but afterwards, in an altercation with the purchasers, B. acquiesced and said, "Well, then, the oil must be delivered," this was held to be a ratification.² So, also, where an agent, without authority, compromised a debt of his principal, who after knowledge of the fact, made no objection, and acquiesced for a length of time in the act, he was held to be bound.³ So, also, if an owner should receive the proceeds of a sale by his supercargo, without objection, it would be a ratification of the sale.⁴ Indeed, silence always affords a strong presumption of ratification;⁵ especially where there are peculiar relations between the parties, such as that of husband and wife, or father and son, where the duty of disavowal is more urgent.⁶ So, also, where a party, having a disputed claim against another, intrusted a receipt in full to his agent, and the latter settled with the debtor for one half the amount, and gave him the receipt, and the principal received the money, and sued the debtor for the balance, it was

¹ *Codwise v. Hacker*, 1 Cain. 526; *Ward v. Evans*, Salk. 442; s. c. 2 Lord Raym. 928; *Thorold v. Smith*, 11 Mod. 88; *Conn v. Penn*, 1 Peters, Circ. R. 496; *Loraine v. Cartwright*, 3 Wash. Circ. R. 151; *Richmond Manuf. Co. v. Starks*, 4 Mason, R. 286; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Bank of Columbia v. Patterson's Adm'rs*, 7 Cranch, 299; *Rogers v. Kneeland*, 13 Wend. 114; *Terrill v. Flower*, 6 Martin; *Baker v. Byrne*, 2 Smedes & Marsh. 193. But see contra *Cady v. Shepherd*, 11 Pick. 400; Story on Agency, § 49 and note; *Ibid.* § 242, § 252, (2d ed.); Story on Part. § 122, and note.

² *Soames v. Spencer*, 1 Dowl. & Ryl. 32. See also *Maclean v. Dunn*, 4 Bing. R. 722; *Johnson v. Smith*, 21 Conn. R. 627; *Byrne v. Doughty*, 13 Geo. R. 46.

³ *Armstrong v. Gilchrist*, 2 Johns. Cas. 424.

⁴ *Forrestier v. Boardman*, 1 Story, R. 43; *Hastings v. Bangor House Proprietors*, 6 Shep. R. 436; *Moss v. Rossie Co.* 5 Hill, R. 137.

⁵ *McConnell v. Bowdry*, 4 Munroe, R. 392; *Veazie v. Williams*, 8 How. 134; *McCulloch v. McKee*, 16 Penn. St. R. 289.

⁶ 2 Greenleaf on Evidence, § 67.

held, that, by receiving the money, he had ratified the act of his agent.¹ And, *à fortiori*, when a principal knowingly receives the receipts and proceeds of a contract made by an agent, he makes it his own by implication, so that, in such case, if the agent have been guilty of fraudulent assertions, the principal would be liable thereon; for, *qui sentit commodum sentire debet et onus*.²

§ 162. There is, however, one important modification of this rule, namely, — if the act of the agent be *void*, or if it be *illegal or directly injurious to another*, no subsequent ratification will render it operative. But if it be merely voidable, a ratification will have the same effect as a prior authority, and gives it full authority, *ab initio*.³ Thus, if an agent, without authority, make a purchase of goods, and give a bought note therefor, and the principal, after full knowledge of the transaction, ratify it, such a ratification will render the signing of the note valid under the statute of frauds, so as to bind both parties.⁴

§ 163. There is, however, an exception to this doctrine, which obtains in cases where the act of the agent, if authorized, would create an obligation on the part of third persons to perform certain acts and duties, the omission of which would operate to their injury; or where it would defeat a right or estate already vested in such third person.⁵ In such cases, a subsequent ratification of the unauthorized act will not bind the third person.⁶ Thus, where a lease contained a condition,

¹ *Palmerton v. Huxford*, 4 Denio, R. 166.

² *Foster v. Swasey*, 2 Woodbury & Minot, 217.

³ Co. Lit. 295 *b*; 306 *b*; Hargr. & Butler's note; Gilb. on Tenures, 75; Dyer, R. 263, pl. 37; Com. Dig. Confirmation; 1 Story on Eq. Jurisp. § 306; *Wilkinson v. Leland*, 2 Peters, R. 661, 662; *Vernon's Case*, 4 Co. R. 2*b*.

⁴ *Maclean v. Dunn*, 4 Bing. 722.

⁵ See *Bird v. Brown*, 14 Jurist, 132.

⁶ *Paley on Agency*, by Lloyd, 190, and note *c*, 345, 347; Co. Litt. 258, *a*;

that either party might determine it, upon six months' notice; notice by an unauthorized agent of the landlord, was held not to be valid to determine the lease, although subsequently ratified by the principal.¹ So, also, notice or demand of payment of a bill of exchange or promissory note, by an unauthorized person, would not render the party liable in damages for his default, although such notice or demand should be ratified by the holder.² So, also, notice of the dishonor of a note or bill of exchange by a stranger, would not be a notice, which would bind an indorser or drawer.³

§ 164. A principal must either adopt the whole transaction of a person acting without authority, or refuse the whole. He cannot "blow hot and cold;" and therefore, if he treat a party as his agent in respect to one part of a transaction, he thereby ratifies the whole of it.⁴ Thus, he cannot adopt a sale, made by his agent, without authority, and yet refuse to be bound by the representations of the agent made at the time of the sale.⁵ And if a principal ratify a contract by his agent, he incurs the same liabilities as if he had originally authorized it.⁶

Fitchet v. Adams, 2 Str. 1128; *Goodtitle v. Woodward*, 3 B. & Ald. 689; *Right d. Fisher v. Cuthell*, 5 East, 491; *Doe d. Mann v. Walters*, 10 B. & C. 626; *Story on Agency*, § 246, and note 2; *Solomons v. Dawes*, 1 Esp. R. 83; *Coore v. Callaway*, 1 Esp. 115; *Soles v. Bell*, 1 Camp. 478, (note).

¹ *Right d. Fisher v. Cuthell*, 5 East, 491; *Doe v. Goldwin*, 2 Q. B. Rep. 143.

² *Freeman v. Boynton*, 7 Mass. 483; *Bank of Utica v. Smith*, 18 Johns. 230; *Chitty on Bills*, ch. 9, p. 396, 8th ed.

³ *Tindal v. Brown*, 1 T. R. 167; *Stanton v. Blossom*, 14 Mass. 116; *Story on Bills of Exchange*, § 303, 304; *Hovil v. Pack*, 7 East, R. 164; *Smith v. Hodson*, 4 T. R. 212; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Corning v. Southland*, 3 Hill, 552; *Billon v. Hyde*, 1 Atk. 128; *Story on Agency*, § 250.

⁴ *Hough v. Richardson*, 3 Story, R. 689; *Wilson v. Poulter*, 2 Strange, R. 857; *Hovil v. Pack*, 7 East, R. 164; *Daniel v. Mitchell*, 1 Story, R. 172; *Small v. Atwood*, 1 Younge, R. 407; s. c. on Appeal, 6 Clark & Finell. 232.

⁵ *Hough v. Richardson*, 3 Story, R. 689.

⁶ *Wilson v. Tummon*, 6 Scott, R. 904; *Smethurst v. Taylor*, 12 Mees. & Welsb. 554; *Doe v. Goldwin*, 2 Adolph. & Ell. N. S. 143.

LIABILITIES TO THIRD PERSONS.

§ 165. We shall next consider the *Liabilities of Agents to Third Persons*.—Where an agent contracts in behalf of his principal, he will not be liable to third persons, when credit is given exclusively to the principal. But if credit be given to the agent exclusively, or to both principal and agent, the agent will be personally responsible.¹ In most of the cases of contract, therefore, the principal question is, to whom was the credit given; and this is a question of fact for the jury.² Where an agent exceeds his authority, he will be personally responsible to the person with whom he is dealing, if the limitations of his authority be unknown to such person,³ or if he guarantee a ratification by his principal, of acts which the other party knows to be beyond his authority.⁴ Thus, where

¹ See *Hancock v. Fairfield*, 30 Maine, 299; *Chadwick v. Madon*, 12 Eng. Law and Eq. R. 180; *Potts v. Henderson*, 2 Carter, 327.

² Story on Agency, § 261, § 279; *Serace v. Whittington*, 2 B. & C. 11; *Iveson v. Conington*, 7 Wend. 106; 3 Chitty on Com. & Manuf. 211, 212. See ante, § 142, 143.

³ In such cases the authorities are conflicting whether the remedy against the agent is *on the contract*, or by action on the case. See *Jefts v. York*, 4 Cush. R. 371; *Abbey v. Chase*, 6 Cush. 56; *Ogden v. Raymond*, 22 Conn. 385; *Waller v. Bank of N. Y.*, 13 Barber, 639; *Jenkins v. Hutchinson*, 13 Q. B. Rep. 741; *Bay v. Cook*, 2 Zabriskie, 313.

⁴ *Smout v. Ilbery*, 10 Mees. & Welsb. 1. In this case Alderson, B., said: "The courts have held that where a party making the contract as agent *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion,

the defendant made an agreement with the plaintiff, who was master of the brig *Sir Alexander Mackenzie*, in respect to a certain voyage, and described himself as "consignee and agent of the above brig and cargo, on behalf of Mr. Meirelles, merchant of Liverpool," and the voyage having been performed, an action was brought against the defendant for the freight, and the plaintiff proved that Mr. Meirelles had never authorized the defendant to act for him, and rejected the contract, it was held that the defendant was personally liable.¹ So, also, where a broker, who had received special instructions to purchase silk of a certain quality, purchased silk of a different quality, he was held to be liable personally in an action for the price.² So, also, where an agent holds himself out as principal, without disclosing the fact of his agency, he will render himself responsible, because he thereby assumes the credit upon his contract.³ The principal, however, would also be liable, if the act were within the scope of the agent's authority.⁴ So, also, where agents suppress the name of their principal, though they are known to be agents, they are personally liable.⁵ And where a party draws a bill and appends to his signature the word "agent" without stating for whom he is agent, he makes himself personally liable.⁶

it is equally just that he who makes such assertion should be personally liable for its consequences."

¹ *Kennedy v. Gouveia*, 3 Dowl. & Ryl. 503.

² *East India Co. v. Hensley*, 1 Esp. R. 111.

³ *Owen v. Gooch*, 2 Esp. 567; *Ex parte Hartop*, 12 Ves. 352; *Patterson v. Gandasequi*, 15 East, 62; *Stackpole v. Arnold*, 11 Mass. 27; *Raymond v. Crown & Eagle Mills*, 2 Metcalf, R. 319; 2 Kent, Comm. Lect. 41, p. 629; *Smyth v. Anderson*, 8 Com. Bench R. 21; *Peterson v. Ayre*, 24 Eng. Law & Eq. R. 389, note. *Waring v. Mason*, 18 Wend. 425; *Story on Agency*, § 266, § 267.

⁴ *Jones v. Littledale*, 6 Adolph. & Ell. 486; *Pentz v. Stanton*, 10 Wend. 271, ante; *Patterson v. Gandasequi*, 15 East, 62; *Higgins v. Senior*, 8 Mees. & Welsb. 834; *Kymer v. Suwercropp*, 1 Camp. 109; *Raymond v. Crown & Eagle Mills*, 2 Metcalf, 319; *French v. Price*, 24 Pick. R. 13.

⁵ *Patterson v. Gandasequi*, 15 East, 62. Cases cited in the immediately previous notes; *Winsor v. Griggs*, 5 Cush. 210.

⁶ *Webb v. Mauro*, 1 Morris, (Iowa,) R. 488.

§ 165 *a*. Where an agent buys goods, in the country for a foreign principal, credit is to be taken as given to the agent, and not to the principal.¹ So, also, if an agent sell goods for a foreign principal, he would be responsible for a breach of contract by his principal in not delivering them; although the contract should be made in the principal's name, — and the reason of this rule is the improbability that credit in such a case would be given to the foreigner.² But where the contract is expressly with the foreign principal in writing, and the agent merely signs the contract as his representative and in his principal's name, the agent would not be liable, the reason of the rule failing.³ Thus, where foreign principals made a written contract with the plaintiff whereby they, by name, agreed to hire him to serve them abroad at a certain rate and for a certain period, and their agent signed the contract for them in London, "for Vacher & Tilly, — Charles Kekulé," it was held, that the agent did not thereby render himself personally responsible for the wrongful dismissal of the plaintiff by his foreign principals.⁴

¹ *Thompson v. Davenport*, 9 Barn. & Cres. 87.

² *Thompson v. Davenport*, 9 Barn. & Cres. 87; *Smyth v. Anderson*, 7 Com. Bench R. 21; *Wilson v. Zulueta*, 14 Q. B. 405; *Mahony v. Kekulé*, 25 Eng. Law & Eq. R. 280.

³ *Mahony v. Kekulé*, 25 Eng. Law & Eq. R. 280, per Jervis, C. J.; *Peterson v. Ayre*, 24 Eng. Law & Eq. R. 382; *Smyth v. Anderson*, 7 Com. Bench R. 21.

⁴ *Mahony v. Kekulé*, 25 Eng. Law & Eq. R. 280. In this case Jervis, C. J., said: "I think this is a very clear case, and that there ought to be no rule. No doubt, ordinarily, the question arising on a contract is one of intention, and that intention, it may be, is frequently to be gathered from the contract and other circumstances; but where, as in this case, the contract is in writing, and clear upon the face of it, we must look to the contract alone. Where an agent in England buys for a foreigner resident abroad, a long series of decisions has established that the agent is generally to be considered as pledging his own credit, because it is highly improbable that the seller would have given credit to the foreigner. But where the contract is made in writing, expressly with the foreigner, and not with the agent, the latter is not liable. But it is argued, that because the agent in this case has signed the contract, he is there-

§ 165 *b*. But although an agent, who acts without authority, renders himself personally liable, a question arises whether he would be liable in an action on the contract itself, or only in a special action for damages, which does not seem to be settled. The weight of authority, however, seems to be in favor of the rule as laid down in a recent case in England, that where a person acts as agent, and so names himself in an instrument, he cannot be made a party to the instrument and be sued upon it, unless it be shown that he was the real principal; although he would be liable in a different form of action for damages resulting from his misrepresenting himself to have authority to act as agent when he had no authority.¹

fore to be liable. That does not at all follow. Kekulé here represents himself as signing, not on his own account at all, but for Vacher & Tilly, professing to bind them, and if signing within the scope of his authority, actually binding them. *Wilson v. Zulueta*, is altogether distinguishable. The decision there proceeded upon the particular words of the contract, and the court held that Zulueta, though contracting on behalf of a foreign principal, had, by the terms of the contract, made himself liable. In the present case Kekulé signs, representing Vacher & Tilly, and not at all on his own account; it is just the same as if he had signed the name. The verdict was, therefore, rightly entered for the defendant, on the first issue, and there will be no rule." See also *Rogers v. March*, 23 Maine R. 106.

¹ *Jenkins v. Hutchinson*, 13 Jurist, 763. In this case Lord Denman said: "It is not pretended that the defendant had any interest as principal; he signed as agent, intending to bind a principal, and in no other character. That he may be liable to the plaintiff in another form of action, for any damage sustained by his representing himself to be agent, when he was not, is very possible; but the question is here, whether he can be sued on the charter-party itself, as a party to it. No reported case has decided that a party so circumstanced, can be sued on the instrument itself. Mr. Justice Story, in his book on the Law of Agency, p. 226, ed. 1839, in a note, states that the decisions in the American courts are conflicting on this point, and that 'in England it is held, that the suit must be by a special action on the case,' (citing *Polhill v. Walter*, 3 B. & Adol. 114). That case does not, perhaps, establish the broad proposition; for the contract was a bill of exchange—an instrument differing in many respects from ordinary contracts. But, even in the case of a bill of exchange, the Court of Exchequer, in *Wilson v. Barthrop*, (2 Mees. & Welsb. 863,) did not at once repudiate the possibility that an

Nor would it seem to make any difference whether there were *mala fides* in the transaction, or whether the misrepresentation were simply by mistake and without fraudulent intention, in neither case would the agent be liable on the contract,¹ unless,

agent might be so liable. The case, however, went off, on the ground that he might have had authority to bind the principal, and did not appear to have acted *mala fide*.

"In the absence of any direct authority, we think that a party who executes an instrument in the name of another, whose name he puts to the instrument, and adds his own name only as agent for that other, cannot be treated as a party to that instrument, and be sued upon it, unless it be shown that he was the *real* principal." See also *Law v. Nicholson*, 19 Law Times Rep. 122; *Downman v. Jones*, 9 Jurist, 451; *Smout v. Ilbery*, 10 Mees. & Welsb. 1. The same rule obtains in Maine, *Stetson v. Patten*, 2 Greenl. R. 358; and in Massachusetts, *Long v. Colburn*, 11 Mass. R. 97; *Ballou v. Talbot*, 16 Mass. 461; *Jefts v. York*, 4 Cush. R. 371; and in Pennsylvania, *Hopkins v. Mehahey*, 11 Serg. & Rawle, 126. But in New York, the agent has been held personally liable on the contract in such cases. *Dusenbury v. Ellis*, 3 Johns. Cas. 70; *White v. Skinner*, 13 Johns. R. 307; *Meech v. Smith*, 7 Wend. R. 315; *Randall v. Van Vechten*, 19 Johns. R. 60; *Palmer v. Stephens*, 1 Denio, R. 471; and in New Hampshire the rule is similar. *Woods v. Dennett*, 9 N. Hamp. R. 55; *Savage v. Rix*, 9 N. Hamp. R. 263.

¹ *Jenkins v. Hutchinson*, 13 Jurist, 763, and cases cited above. In *Smout v. Ilbery*, 10 Mees. & Welsb. 1, Baron Alderson says: "On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found that he has either been guilty of some fraud, has made some statement, which he knew to be false, or has stated to be true, what he did not know to be true; omitting, at the same time, to give such information to the other contracting party, as would enable him, equally with himself, to judge as to the authority, under which he proposed to act. Of the first, it is not necessary to cite any instance. *Polhill v. Walter* is an instance of the second; and the cases, where the agent never had any authority to contract at all, but believed that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. To these may be added those cited by Mr. Justice Story, in his book on Agency, p. 261, note 3, (§ 264, n. 2). The present case seems to us to be distinguishable from all these authorities. Here the agent had, in fact, full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There

perhaps, where there are apt words therein to charge him as principal.¹

§ 166. But if credit be given solely to the principal, — as if the agent declare his agency, and expressly refuse to incur personal responsibility at the time, — the irresponsibility of the principal will not create a liability on the part of the agent, unless the agent have been guilty of some misrepresentation or fraud.² So, also, public officers, who are known to contract in their official character, will not be responsible on contracts made for the government; because exclusive credit is considered to be given to the government, and not to its agents.³

was no *mala fides* on her part, no want of due diligence in acquiring knowledge of the revocation; no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow, that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument, pressed with the difficulty, that, if the defendant be not personally liable, there is no one liable on this contract at all; for *Blades v. Free* has decided, that in such a case the executors of the husband are not liable. This may be so; but we do not think, that, if it be so, it affords to us a sufficient ground for holding the defendant liable. In the ordinary case of a wife, who makes a contract in her husband's lifetime, for which the husband is not liable, the same consequence follows. In that case, as here, no one is liable upon the contract so made."

¹ See *Woodes v. Dennett*, 9 N. Hamp. R. 55; *Savage v. Rix*, 9 N. Hamp. R. 263, in which it is held that if a person having no authority to act as agent, undertake so to act in making the contract, he will be personally liable, if the contract, after rejecting therefrom what he was not authorized to put in it, contain apt words to charge himself as principal. But see the cases cited *supra*.

² *Smout v. Ilbery*, 10 Mees. & Welsb. 10; *Jones v. Downman*, 4 Adolph. & Ell. N. S. 239; *Lewis v. Nicholson*, 12 Eng. Law & Eq. R. 430; *Story on Agency*, § 265.

³ *Simonds v. Heard*, 23 Pick. R. 124; *Hodgson v. Dexter*, 1 Cranch, R. 345; *Freeman v. Otis*, 9 Mass. R. 272.

Thus, the governor of a fort, or colony, or the captain of a military company, is not liable for stores or provisions supplied to his order for the use of the government, or for the support of troops.¹ But a committee acting for a town do not contract in public capacity, so as to exclude personal liability.²

§ 167. If a person make a contract in his own name, or assume a personal liability by the terms of his contract, he will be personally liable, although the fact of his agency be known;³ as if he give a note, in his own name, for goods purchased by him for his principal, and acknowledged to be so purchased, by the terms of the note itself;⁴ or if he procure a policy of insurance to be underwritten in his name;⁵ or accept a bill in his own name, drawn upon him on account of his principal;⁶ or, especially where the instrument is under seal, and is ostensibly the deed of the agent, this rule will apply.⁷

§ 168. Agents are also responsible, personally, when there is

¹ *Macbeath v. Haldimand*, 1 T. R. 180; *Rice v. Chute*, 1 East, R. 579; *Myrtle v. Beaver*, 1 East, R. 135; *Gidley v. Lord Palmerston*, 7 Moore, R. 91; Post, § 170.

² *Simonds v. Heard*, 23 Pick. R. 124.

³ *Waring v. Mason*, 18 Wend. R. 425; *Clealand v. Walker*, 11 Ala. R. 1058; *Franklyn v. Lamond*, 4 Man. Gr. & Scott, 637.

⁴ *Alford v. Eglisfield*, Dyer, 230 b; *Paley on Agency*, by Lloyd, 378, 379; *Talbot v. Godbolt*, Yelv. 137; 2 Kent, Comm. Lect. 41, 629, 630, (3d ed.); *Jones v. Littledale*, 6 Ad. & Ellis, 486; *Norton v. Herron*, 1 Car. & P. 648; s. c. 1 Ry. & Mood. 229; *Leadbitter v. Farrow*, cited in *Bayley on Bills*, ch. 2, § 7, (5th ed.); s. c. 5 M. & S. 345; *Lefevre v. Lloyd*, 5 Taunt. 749; *Goupy v. Harden*, 7 Taunt. 159; *Lucas v. Groning*, 7 Taunt. 161; *Stackpole v. Arnold*, 11 Mass. 27; *Newhall v. Dunlap*, 2 Shep. R. 180.

⁵ *Stackpole v. Arnold*, 11 Mass. 27; *Emerigon*, Assur. ch. 5, § 4, p. 139; *Story on Agency*, § 272; *Marsh. on Insur. B.* 1, ch. 8, § 2, p. 292.

⁶ *Thomas v. Bishop*, 2 Str. 955.

⁷ *Meyer v. Barker*, 6 Binn. 228, 234; *Stone v. Wood*, 7 Cow. 453; *Story on Agency*, § 155, 156, 157, 161, 272, 273.

no other person who can be made legally responsible as a principal, upon the ground, that he who contracts in his own name, as agent of a person incapable of contracting, must be presumed to intend to bind himself; and also, because the party with whom the agent contracted would otherwise have no remedy.¹ Thus, if an agent signed a note "as guardian of A. B.;" or as "trustee of A. B.;" or as "executor of A. B.;" he will render himself personally liable; because neither the ward in the first case, nor the trustee in the second, nor the person deceased in the last, could be personally and primarily liable.² Yet if persons consent to deal with an agent, without his personal credit and responsibility, but upon the faith, that they will be repaid by the principal, whether the principal be legally bound or not, the agent will not be liable.³

§ 169. The liability of an agent may also arise by implication from his acts; or from the general usage or habits of the particular parties. The general rule is, that the party to whom credit is knowingly and exclusively given, is liable; and if it be given to both parties, both parties are responsible.⁴ An exclusive credit to the agent is sometimes so strongly inferred from the circumstances, as to afford a presumption of law; as where a factor buys and sells goods for a principal in a foreign

¹ *Layng v. Stewart*, 1 Watts & Serg. 222.

² *Thacher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58; *Sumner v. Williams*, 8 Mass. 162; *Hills v. Bannister*, 8 Cow. 31; *Childs v. Monins*, 2 Brod. & Bing. 460; *Lambert v. Knott*, 6 Dowl. & Ryl. 122; *King v. Thom*, 1 T. R. 487; *Parrott v. Eyre*, 10 Bing. 283; *Horsly v. Bell*, 1 Brow. Ch. R. 101, note; s. c. *Ambler*, 770; *Eaton v. Bell*, 5 B. & Ald. 34; *Higgins v. Livingstone*, 4 Dow. R. 355.

³ *Smith on Merc. Law*, 97; 2 Kent, Comm. p. 630, 631, (3d ed.); *Burls v. Smith*, 7 Bing. 705; *Tobey v. Claffin*, 3 Sumner, 379; *Parrot v. Eyre*, 10 Bing. 283.

⁴ *Paley on Agency*, by Lloyd, 368, 370, 371; *Smith on Merc. Law*, 79; *Owen v. Gooch*, 2 Esp. 567; *Ex parte Hartop*, 12 Ves. 352; *Addison v. Gandassequi*, 4 Taunt. 575; *Paterson v. Gandassequi*, 15 East, 62; *Thomson v. Davenport*, 9 B. & C. 78, 88, 90.

country.¹ So, also, in some particular agencies, as in that of a factor and master of a ship, a double responsibility will be presumed.² This presumption can, however, be disproved, and proof of exclusive credit must always be matter of evidence, dependent on the circumstances of each particular case.³

§ 170. The foregoing rules, with regard to the liability of agents, apply exclusively to cases of private agency. The doctrine in relation to agents contracting in behalf of the government, or of the public, is, that such agents will not be personally bound upon their contracts, as to third persons, unless they expressly make themselves liable; or, at least, unless there be a manifest intention between the parties to create a personal responsibility on the part of the agent.⁴ The reason of this rule is, that no private person can be presumed to have assumed any liability in respect of the contracts of the govern-

¹ *Gonzales v. Sladen*, Bull. N. P. 130; 2 *Liverm. on Agency*, 249; *Paley on Agency*, by Lloyd, 248, 273; *Patterson v. Gandasequi*, 15 East, 62; *Thomson v. Davenport*, 9 B. & C. 78; *Houghton v. Matthews*, 3 B. & P. 489; *De Gaillon v. L'Aigle*, 1 B. & P. 368.

² 1 Bell, Comm. § 418, p. 398, (4th ed.); *Abbott on Shipp.* Pt. 2, ch. 2, § 3, p. 91, (ed. 1829); *Ibid.* § 4, p. 93; *Ibid.* § 5, p. 95; *Pothier on Obligation*, n. 82, 448.

³ *Hussey v. Allen*, 6 Mass. 163; *Rich v. Coe*, Cowp. 636; *Leonard v. Huntington*, 15 Johns. 298; *Marquand v. Webb*, 16 Johns. 89; *Garnham v. Bennett*, 2 Str. 816; *James v. Bixby*, 11 Mass. 34; *Hussey v. Christie*, 9 East, 432; 3 Kent, Comm. Lect. 46, p. 161, (3d ed.); 1 Bell, Comm. § 434, p. 413.

⁴ *Macbeath v. Haldimand*, 1 T. R. 172; *Bowen v. Morris*, 2 Taunt. 374, 387; *Unwin v. Wolsely*, 1 T. R. 674; *Lee v. Munroe*, 7 Cranch, R. 366; *Brown v. Austin*, 1 Mass. 208; *Dawes v. Jackson*, 9 Mass. 490; 2 Kent, Com. Lect. 41, p. 632; *Walker v. Swartwout*, 12 Johns. 444; *Gidley v. Lord Palmerston*, 3 Brod. & Bing. 275; *Bend v. Hoyt*, 13 Peters, 263; *Story on Agency*, ch. 11, § 302, et seq.; *Tippets v. Walker*, 4 Mass. 595; *Hodgson v. Dexter*, 1 Cranch, R. 345; *Fox v. Drake*, 8 Cowen, R. 191; *Rathbone v. Budlong*, 15 Johns. R. 1; *Enloe v. Hall*, 1 Humph. Tenn. R. 304; *Copes v. Matthews*, 10 Smedes & Marsh. 398.

ment; and no person can be presumed to have intended to trust to him personally, inasmuch as the ability of the government to pay its just debts is vastly greater than that of any private individual can possibly be. This principle applies not only to simple contracts, but to specialties executed by agents of the government, under their own seals and names.¹

§ 171. An agent is personally liable to third persons for his misfeasances and positive wrongs; but he is, ordinarily, only responsible to his principal for his omissions and non-feasances in the course of his duty.² The principal, in such case, would be solely liable. Thus, if the servant of a common carrier negligently lose a parcel of goods intrusted to him, the principal alone will be responsible to the bailor or owner.³ But if, in levying an execution, an officer should wilfully break and injure the property of the debtor, he would be personally responsible.⁴ So, also, if both principal and agent be wrongdoers, both are liable personally. Thus, if an auctioneer should be employed by a sheriff to sell goods at auction, which he had unlawfully seized upon an execution, both sheriff and auctioneer would be liable to an action of trespass.⁵ No action, however, will lie against the agent for the misfeas-

¹ Chitty on Com. & Manuf. 213, 214; *Unwin v. Wolsely*, 1 T. R. 674; *Walker v. Swartwout*, 12 Johns. 444.

² Paley on Agency, by Lloyd, 296-399; *Lane v. Cotton*, 12 Mod. 488; s. c. 1 Lord Raym. 646, 655; Story on Bailments, 400; *Clark v. City Corp. of Washington*, 12 Wheaton, R. 40; *Randleson v. Murray*, 3 Nev. & Per. 239; s. c. 8 Adolph. & Ell. 109; *Milligan v. Wedge*, 12 Adolph. & Ell. 737.

³ *Lane v. Cotton*, 12 Mod. 488.

⁴ Paley on Agency, by Lloyd, 396, 397, 398, 399; Story on Agency, § 308; *Cameron v. Reynolds*, Cowp. 403; *Perkins v. Smith, Sayer*, 40, 42; Story on Bail, § 402, 404.

⁵ *Farebrother v. Ansley*, 1 Camp. 343. See also *Stephens v. Elwall*, 4 Maule & Selw. 259; *Perkins v. Smith, Sayer*, 40; s. c. 1 Wils. 328; *McCombie v. Davies*, 6 East, 538.

ance of persons retained by him in the service of his principal.¹

§ 172. There are, however, some exceptions to this rule, as to non-feasances. Thus, the postmaster-general will not be liable for the default or negligence or misfeasance of his deputies, or clerks, on the ground of public policy; but the deputies will be treated as principals.² So, also, by the principles of the maritime law, masters of ships, although the agents of the owners, will be responsible as principals to third persons, not only for their own negligences and non-feasances, but for that of their sub-agents.³ A master of a ship will not, however, be responsible for wilful trespasses and injuries, done by persons employed under him, any more than the owner will.⁴

§ 173. Where the agent, in the due exercise of his powers, makes a contract as agent, taking no personal responsibility, the action must be brought against the principal. So, also, if money be paid over to a known agent for the use of his principal, an action for money had and received cannot be maintained against him, but must be brought against the principal,⁵

¹ *Stone v. Cartwright*, 6 T. R. 411; *Hills v. Ross*, 3 Dall. R. 331; *Nicholson v. Mounsey*, 15 East, 383; *Paley on Agency*, by Lloyd, 402; *Denison v. Seymour*, 9 Wend. 8, 12; *Bush v. Steinman*, 1 B. & P. 404; *Story on Agency*, § 313.

² *Rowning v. Goodchild*, 3 Wils. 443; s. c. 5 Burr. 2718; 2 W. Bl. 906; *Whitefield v. De Despencer*, Cowp. 765; *Seymour v. Van Slyck*, 8 Wend. 403, 422; *U. S. v. Kirkpatrick*, 9 Wheat. 720, 735; *Story on Agency*, § 314.

³ *Schieffelin v. Harvey*, 6 Johns. 170, 176; *Morse v. Slue*, 1 Vent. 238; s. c. 1 Mod. 85; *Abbott on Shipp.* Pt. 3, ch. 3, § 3, ed. 1829; *Dunlop v. Munroe*, 7 Cranch, 242; *Story on Bailm.* 463.

⁴ *Bowcher v. Noidstrom*, 1 Taunt. 568. See also *Nicholson v. Mounsey*, 15 East, 384.

⁵ *Staplefield v. Yewd*, Bull. N. P. 133, cited 4 Burr. R. 1986; *Dixon v. Hamond*, 2 Barn. & Ald. 313; *Edden v. Read*, 3 Camp. R. 339; *Sims v. Brittain*, 4 Barn. & Adolph. 375.

the agent being only responsible for breach of his actual authority to his principal.¹ But if the payment to the agent be utterly void, so that he is not accountable to his principal, he will be liable to the parties paying him,² unless he have actually paid over the money to his principal.³ Thus, if money be paid by mistake to an agent, he will be liable to a personal action therefor, so long as it remains in his hands, although his principal be credited therefor on account forwarded to him.⁴ But if the money be actually paid over to the principal, the agent will not be liable,⁵ unless he have been guilty of fraud or of improper conduct.⁶ But this rule only applies to cases where money is paid to an agent by a third person for the use of the principal; and when money is paid to the agent by the principal for the use of a third person, no action lies against the agent by such third person, but only by the principal.⁷

RIGHTS OF AGENTS.

§ 174. We now come to the *Rights of Agents, in respect of their Principals and third Persons*. Every agent is entitled to a compensation for all services done by him in respect to the agency, unless there be a special agreement between the parties to the contrary; or unless he be a gratuitous agent or

¹ Williams v. Everett, 14 East, R. 597.

² Buller v. Harrison, 2 Cowp. R. 565; Bishop v. Eagle, 10 Mod. R. 23; Cox v. Prentice, 3 M. & S. 344.

³ Horsefall v. Handley, 2 Moore, R. 5; s. c. 8 Taunt. R. 136; White v. Bartlett, 9 Bing. R. 378; Tope v. Hockin, 7 Barn. & Cres. 111; Coles v. Wright, 4 Taunt. R. 198; Whitbread v. Brooksbank, 1 Cowp. R. 69.

⁴ Buller v. Harrison, 2 Cowp. R. 565; Cox v. Prentice, 3 Maule & Selw. 344.

⁵ Horsefall v. Handley, 2 Moore, R. 5; White v. Bartlett, 9 Bing. R. 378.

⁶ Townson v. Wilson, 1 Camp. R. 396; Clark v. Johnson, 3 Bing. 424; Robson v. Eaton, 1 T. R. 62; Rogers v. Kelley, 2 Camp. R. 123; Smith v. Sleep, 12 Mees. & Welsb. 588; Wakefield v. Newborn, 6 Adolph. & Ell. N. s. 280; Ashmole v. Wainwright, 2 Ibid. 837; Snowdon v. Davis, 1 Taunt. R. 359.

⁷ Williams v. Everett, 14 East, R. 597.

mandatary; or unless the service be in respect to some matter, which is illegal, or immoral, or in contravention of public policy. This compensation is called a commission, and is determined, in the absence of any express agreement, by the usage in the particular business, in respect to which the agency is exercised; or, in the absence of any usage, by the worth of the services rendered, which is a fact to be determined by a jury.¹ Extraordinary commissions are sometimes allowed; as commissions *del credere*, where the agent sells on credit, at his own risk, and guarantees payment.

§ 175. Before an agent can claim compensation, he must have faithfully performed all his duty;² unless by the usage, in the particular business, in respect to which the agency is created, a proportional remuneration be allowed for a partial performance of the agency. So, also, if the principal die before the business is completed, and the agent become his executor or administrator, his right to receive commissions as agent is determined.

§ 176. All expenses and advances properly incurred, or paid by an agent, and all losses incurred by him in the course of his agency, should be reimbursed to him.³ So, also, if the agent, by the direction of his principal, innocently and unus-

¹ *Eicke v. Meyer*, 3 Camp. 412; *Cohen v. Paget*, 4 Camp. 96; *Roberts v. Jackson*, 2 Stark. 225; *Chapman v. De Tastet*, 2 Stark. 294; *Bower v. Jones*, 8 Bing. 65; *Robinson v. N. Y. Ins. Co.* 2 Caines, 357; *Miller v. Livingston*, 1 Caines, 349; *Story on Agency*, § 326, et seq.; *Armstrong v. Toler*, 11 Wheat. 261, 262; *Story on Conflict of Laws*, § 244-256; *Wyburd v. Stanton*, 4 Esp. 179; *Josephs v. Pebrer*, 3 Barn. & Cres. 639; *Haines v. Busk*, 5 Taunt. 521; *Stackpole v. Earl*, 2 Wils. 133; *Waldo v. Martin*, 4 B. & C. 319; 6 Dowl. & Ry. 364; *Parsons v. Thompson*, 1 H. B. 322.

² *Hamond v. Holiday*, 1 Car. & P. 384; *Broad v. Thomas*, 7 Bing. 99; *Dalton v. Irving*, 4 Car. & P. 289; *Read v. Rann*, 10 Barn. & Cres. 438.

³ *Story on Agency*, § 335-339; *Ramsay v. Gardner*, 11 Johns. 439; *Powell v. Trustees of Newburgh*, 19 Johns. 284; *D'Arcy v. Lyle*, 5 Binn. 441; *Hill v. Packard*, 5 Wend. 375; *Rogers v. Kneeland*, 10 Wend. 218.

piciously do a wrong, or commit a trespass, he will be entitled to compensation from his principal for the damages he sustains.¹ The loss or damage, for which an agent can claim compensation, must, however, be the immediate result of a legal agency, and not the casual or remote result; that is, the agency must be the cause and not the occasion of the loss or damage.²

§ 177. If, however, an agent be guilty of gross negligence, fraud, or misconduct, he cannot recover even for the advances and disbursements, made in the course of his agency.³ Nor can he recover for services and expenses in making a contract illegal and void by statute.⁴ So, also, he cannot recover for expenses and payments made after the revocation of his authority.⁵

§ 178. Agents have also a lien upon the property of the principal, which they have in their hands; and this lien may be either created by an express contract; or be implied from usage; or from the relation of the parties, and the circumstances of the case;⁶ and may be either particular or general, according to the nature of the agency, and the usage of trade. A general lien is a right to retain the property of another, as

¹ *Adamson v. Jarvis*, 4 Bing. 66; *Allaire v. Ouland*, 2 John. Cas. 54; *Coventry v. Barton*, 17 John. 142; *Avery v. Halsey*, 14 Pick. 174; *Fletcher v. Harcott*, Hutton, 55; *Powell v. Trustees of Newburgh*, 19 Johns. 284; *Gower v. Emery*, 6 Shepley, R. 79. See ante, § 138 *a*.

² *Story on Agency*, § 341; *Pothier, Traité de Mandat*, n. 75, 76.

³ *Dodge v. Tileston*, 12 Pick. 328, 332; *Savage v. Birkhead*, 20 Pick. 167; *Sea v. Carpenter*, 16 Ohio, R. 412.

⁴ *Stebbins v. Leowolf*, 3 Cush. R. 137.

⁵ *Vernon v. Hankey*, 2 T. R. 113; 3 Bro. Ch. R. 314; *Copeland v. Stein*, 8 T. R. 204; *Paley on Agency*, by Lloyd, 121, 122, 187; *Story on Agency*, § 349.

⁶ *Fergusson v. Norman*, 5 Bing. N. C. 76, by Ch. J. Tindall; *Green v. Farmer*, 4 Burr. 2221, by Lord Mansfield; *Scarfe v. Morgan*, 4 M. & W. 270; *Montague on Lien*, Pt. 2, ch. 1, 2, p. 26 to 40.

security for any claim. A particular lien is a right to retain it for some charge or claim upon the identical property; as for labor and services bestowed upon it. A general lien is construed more strictly than a particular lien.¹ A right of lien does not entitle the person having it, to sell the property, except with the consent of the owner, which may be either express or implied from the nature of the transaction in respect to the subject-matter of the lien.²

§ 179. A lien can only arise, however, in respect to a liquidated claim, and not in respect to unascertained damages. The claim must, also, be due to the creditor, in his own right, and due from the debtor in his own right. So, also, it is dependent upon possession; and if the property be voluntarily parted with, the lien is gone. But this does not preclude the right of the agent to sue the principal, *in personam*, for the claim, in respect to which the lien arises; it being only a collateral security, to which the agent has no strict property, but only a right of retention.

§ 180. All agents are entitled to a particular lien upon the goods of their principal; but they are not ordinarily entitled to a general lien thereupon; unless by usage in the particular trade, or by force of some special agreement. In respect of some few classes, however, the usage has consolidated into a law, of which the court will take cognizance, without proof. In these cases, however, the usage only raises a presumption, which stands until it is overthrown by clear proof of the contrary. Thus, factors have, by usage, a general lien for all claims arising out of the agency, upon all the goods belonging to their principal in their possession; and upon the funds

¹ 2 Kent, Comm. Lect. 41, p. 634. See Story on Agency, ch. xiv. for a complete view of the law of lien as connected with Agency; Story on Agency, § 375; Kent, Comm. Lect. 41, p. 634, 635, 636.

² Parker v. Brancker, 22 Pick. R. 40; Pothonier v. Dawson, Holt's N. P. R. 383. As to the subject of lien, see Ex parte Foster, 2 Story, R. 131.

received by them from sales in behalf of the principal; and, also, upon all such goods as are on their way to the factor, at the time of the death of the principal. A factor has, also, a lien for all liabilities, incurred by him in the course of his agency; whether by a guaranty, or by advances and payments, or otherwise. But his lien is strictly confined to debts arising from the agency.¹

§ 180 *a*. But where a consignment is made to an agent, with orders to appropriate the proceeds to a particular debt, he would have no lien thereon for a general balance. Thus, where a consignment was shipped to B. by his principal, coupled with an order to transmit the net proceeds of the shipment to A., a creditor of the principal, and B. deducted his general balance, and invested the balances arising from the shipment, and due on a former account, it was held that A. was entitled to the proceeds of the cargo so far as to cover his debt.²

§ 181. So, also, bankers have a general lien upon all securities deposited with them; and may, under certain circumstances, sue thereupon, and recover the amount of the balance due to them.³ This right of lien may be disproved, however, by circumstances.⁴

¹ Story on Agency, § 376, and cases cited; 2 Liverm. on Agency, 38, 39, 40; Drinkwater v. Goodwin, Cowp. 251; Foxcroft v. Devonshire, 2 Burr. 931; Houghton v. Matthews, 3 B. & P. 485; Stevens v. Robins, 12 Mass. 182; Olive v. Smith, 5 Taunt. 56; Hammonds v. Barclay, 2 East, 227; Paley on Agency, by Lloyd, 140; Walker v. Birch, 6 T. R. 258; Maber v. Massias, 2 W. B. 1072; Weymouth v. Boyer, 1 Ves. Jr. 416.

² Ashmead v. Borić, 10 Barr, R. 104.

³ Davis v. Bowsher, 5 T. R. 488; Bolton v. Puller, 1 B. & P. 546; Giles v. Perkins, 9 East, 12; Bolland v. Bygrave, 1 Ry. & Mood. 271; Jourdain v. Lefevre, 1 Esp. 66; Paley on Agency, by Lloyd, 81, 131; Bosanquet v. Dudman, 1 Starkie, R. 1; Scott v. Franklin, 15 East, 428.

⁴ Vanderzee v. Willis, 3 Bro. Ch. 21; Lucas v. Dorrien, 7 Taunt. 278; Mountford v. Scott, 1 Turn. & Russ. 274; Smith on Merc. Law, 338, 339; Paley on Agency, by Lloyd, 121; Story on Agency, § 381.

§ 182. So, also, insurance brokers have a general lien on the policies of insurance in their hands; and upon the funds received through them, for the balance of their general insurance account; but not for a balance due on other business.¹ So, also, where the broker acts for an agent, not knowing him to be so, he has a general lien; but if he have knowledge of the agency, this lien is particular, and only extends to his commission, premium, and charges upon the individual policy.²

§ 183. So, also, attorneys at law, and solicitors in equity, have a general lien upon all documents and papers of their clients, coextensive with the right of the client to such papers. But this lien is restricted to such papers as come into their possession in the course of their professional business.³

§ 184. So, also, common carriers have a general lien for freight and charges, and sometimes for a general balance of accounts. But this lien is little favored, and is only presumptive; if therefore it be disputed, it must be proved.⁴

§ 185. If the agent appoint a sub-agent, between whom and the principal there is a privity, the sub-agent's right of lien will be commensurate with that of the agent. But where such a privity does not exist, he will have no lien against the principal, unless the principal ratify or adopt his acts.⁵

¹ *Castling v. Aubert*, 2 East, 325, 330; *Man v. Ellis*, 2 East, 523; *Hovil v. Pack*, 7 East, 164; *Cranston v. The Phil. Ins. Co.* 5 Binn. 538; *Smith on Merc. Law*, 339, 340; *Spring v. So. Car. Ins. Co.* 8 Wheat. 268, 285; 2 *Liverm. on Agency*, 79, 80; *Paley on Agency*, by Lloyd, 130.

² *Olive v. Smith*, 5 Taunt. 56; *Parker v. Carter*, *Cooke, Bank. Law*, 567, (5th ed.); 2 *Bell, Com.* § 807, 812, 4th ed.

³ *Ex parte Nesbitt*, 2 Sch. & Lefr. 279; *Ex parte Sterling*, 16 Ves. 259; *Ex parte Pemberton*, 18 Ves. Jr. 282; *Stevenson v. Blakelock*, 1 M. & S. 535; *Hollis v. Claridge*, 4 Taunt. 807; *Montague on Lien*.

⁴ *Rushforth v. Hadfield*, 6 East, 519; s. c. 7 East, 224; *Wright v. Snell*, 5 B. & Ald. 350; *Jarvis v. Rogers*, 15 Mass. 389, 395; *Story on Agency*, § 382. See post, common carriers, § 764.

⁵ *Snook v. Davidson*, 2 Campb. 218; *Lanyon v. Blanchard*, 2 Camp. 597;

§ 186. The cases in which an agent can sue third persons in behalf of his principal, may be divided into several classes, in all of which the rights of the two parties are correlative against each other. 1. Where an express contract in writing is made with the agent, personally, the principal not being named;—as where a charter-party is executed by the master of a vessel in his own name, in behalf of the owner;¹—or where a promissory note is given to the agent personally in his own name, though it be for the benefit of the principal;²—or where a negotiable note indorsed in blank is sent by the owner to his agent for collection, and the agent sues as indorsee.³ But if the contract express the agency and name the principal, the suit cannot be brought in the name of the agent; and whenever the instrument, viewed as a whole, plainly indicates that the contract is not made personally with the agent, suit must be brought in the name of the principal.⁴

§ 186 *a.* 2. Where the agent is the ostensible principal, and the fact of the agency does not appear, he is entitled to sue. So, if a person contract for an unknown and unnamed principal, he may himself sue as principal, unless it appear that the defendant relied upon his character as being only that of agent,

Man v. Shifner, 2 East, 523; *Lincoln v. Battelle*, 6 Wend. 475; *Story on Agency*, § 388, 389; *Willinks v. Hollingsworth*, 6 Wheat. 259.

¹ *Humble v. Hunter*, 12 Q. B. 310; *Schmalz v. Avery*, 3 Eng. Law & Eq. R. 394.

² *Commercial Bank v. French*, 21 Pick. R. 486; *Fairfield v. Adams*, 16 Pick. R. 381; *Fisher v. Ellis*, 3 Pick. R. 322; *Buffum v. Chadwick*, 8 Mass. R. 103. See also *Wheelock v. Wheelock*, 5 Verm. R. 433; *Joseph v. Knox*, 3 Camp. R. 320; *Atkins v. Amber*, 2 Esp. R. 493; *Solomons v. The Bank of England*, 13 East, R. 135.

³ *Solomons v. The Bank of England*, 13 East, R. 135; *Adams v. Oakes*, 6 Car. & Payne, 70. See also *Story on Agency*, § 394, and cases cited; *Dugan v. U. S.*, 3 Wheat. R. 172.

⁴ Per Mr. Justice Story in *Story on Agency*, § 395, note; *Bowen v. Morris*, 2 Taunt. R. 374; *Hinds v. Stone*, *Brayton*, R. 230; *Griffith v. Ingledew*, 6 Serg. & Rawle, 429; *Amos v. Temperley*, 8 Mees. & Welsb. 798; *Bickerton v. Burrell*, 5 Maule & Selw. 383; *Rayner v. Grote*, 15 Mees. & Welsb. 359.

and would not have contracted with him as principal, had he known him to be so.¹ Where in the contract the agent is stated expressly to be principal, the agent may not only maintain an action, but it is not competent for the real principal, if he be a third party, to sue thereupon.²

§ 186 *b.* 3. Where by usage of trade the agent is authorized to act as owner or principal, and is dealt with as such, he may sue, although he is known to be an agent. And in this class of cases it matters not whether the contract be deemed to be made exclusively with the agent or not.³ Generally speaking, where the agent has a special property or interest in the subject-matter of the contract, or a lien thereon, he would be entitled to sue, — as if he be a factor, or auctioneer, or master of a ship.⁴

§ 186 *c.* 4. In all cases of torts, where the agent sustains a private and personal injury from the fraud or deceit of a third person, he may maintain an action against him for such wrongful act; and wherever he is induced, by false representations, to pay over money belonging to his principal to a person not entitled to receive it, he may bring an action to recover it back.⁵

¹ *Schmalz v. Avery*, 3 Eng. Law & Eq. R. 395.

² *Humble v. Hunter*, 12 Q. B. 310; *Schmalz v. Avery*, 3 Eng. Law & Eq. R. 394. Post, § 186 *d.*

³ Story on Agency, § 269, § 397, and cases cited.

⁴ *Williams v. Millington*, 1 H. Bl. R. 81, 84; *Girard v. Taggart*, 5 Serg. & Rawle, 19, 27; *Coppin v. Craig*, 7 Taunt. R. 243; *Hudson v. Granger*, 5 Barn. & Ald. 27. See post, § 320, § 353, § 371.

⁵ Story on Agency, § 416; *Stevenson v. Mortimer*, 2 Cowp. R. 806, per Lord Mansfield; *Oom v. Bruce*, 12 East, R. 225; *Holt v. Ely*, 18 Eng. Law & Eq. R. 424. In this case Lord Campbell said: "I am of opinion that this rule ought to be discharged. I think that Holt, under the circumstances of this case, may well maintain this action for the amount which he paid to the defendant, he, Holt, having been induced to pay the money, by the fraud and false representation of the defendant. I am also of opinion that Holt was guilty of negligence, and that he could not have set off this payment, if Lane

§ 187. Ordinarily, the right of the agent to sue is subordinate to that of the principal, and may be superseded or extinguished at any time by his intervention.¹ Any defence which would be sufficient to defeat a suit, if brought by the principal, will also be complete against the agent.² But if a written contract be made exclusively with the agent, who expressly states himself therein to be principal, the real principal would not be entitled to maintain an action thereupon,³ by showing that the professed principal was merely his agent. Yet if the contract contained any indication of agency, the rule would be otherwise.⁴ The same rule also applies to public agents; in as far as they are not suable, they cannot sue.⁵

§ 187 *a*. Where a person makes a contract in the character and with the profession of agent, for some unknown and un-

had brought an action against him to recover the amount of the fund with which he had been intrusted. I will even go further and say, that as it is clear there was a fraud practised by Ely, the defendant, upon Holt, and assuming that there was a general authority to Holt to pay money on Captain Lane's account, I think that in that case either Captain Lane or Holt might maintain this action. Where a man pays money by his agent, which ought not to have been paid, either the agent or the principal may bring an action to recover it back. That is the ground of the decision in *Stevenson v. Mortimer*. That principle has been adopted by Mr. Justice Story in his work on *Principal and Agent*; and I consider it a maxim of law, that where a fraud has been practised upon a person, that he should be replaced in the same position as he was before such fraud was practised upon him. I think this case comes within that principle, and that this rule to enter a nonsuit should therefore be discharged."

¹ *Coppin v. Walker*, 7 Taunt. 237; *Coppin v. Craig*, 7 Taunt. 243; *Morris v. Cleasby*, 1 M. & S. 576; *Walter v. Ross*, 2 Wash. Circ. R. 283.

² *Atkins v. Amber*, 2 Esp. R. 493; 3 Chitty on Com. & Manuf. 201, 202, 203, 211; *Leeds v. Marine Ins. Co.* 6 Wheat. 565; *Smith on Merc. Law*, 77; *Story on Agency*, § 404, 405; *Solomons v. Bank of Eng.* 13 East, 135 *n.*; *De La Chaumette v. Bank of Eng.* 9 B. & C. 208; s. c. 2 B. & Ad. 385.

³ *Humble v. Hunter*, 12 Q. B. 310; *Schmalz v. Avery*, 3 Eng. Law & Eq. R. 395.

⁴ *Ibid.*

⁵ *Bainbridge v. Downie*, 6 Mass. 253; *Dugan v. U. S.*, 3 Wheat. 172, 180.

named principal, when in fact he is himself the principal, he would be ordinarily entitled to sue in his own name thereon.¹ Yet if his deceit should operate injuriously as a fraud upon the other party, and the contract were executory, it seems that he could not enforce it.² And if the person dealing with him as agent relied upon his character as being what he represented it to be, and would not have contracted with him as principal, the same rule would apply.³

¹ *Schmalz v. Avery*, 3 Eng. Law & Eq. R. 393.

² *Rayner v. Grote*, 15 Mees. & Welsb. 359.

³ In *Schmalz v. Avery*, 3 Eng. Law & Eq. 393, which was an action on a charter-party not under seal, against the defendant, a ship-owner, for not taking the cargo on board, according to the charter-party, Patterson, J., said: "The question raised on the plea of non-assumpsit is, whether the action will lie at the suit of the present plaintiff. The charter-party, in terms, states that it is made by Schmalz & Co., the plaintiffs, as agents for the freighter. It then states the terms of the contract, and concludes with these words: 'This charter-party being concluded on behalf of another party, it is agreed that all responsibility on the part of Schmalz & Co. ceases as soon as the cargo is shipped.' The declaration treats the charter-party as made between the plaintiff and the defendant, without mentioning the character of the plaintiff as agent, and without any reference to the concluding clause, thereby treating the plaintiff as principal in the contract.

"At the trial it was proved that the plaintiff was, in point of fact, the real freighter. No objection was taken to the admissibility of the evidence by which that fact was established; but at the close of the plaintiff's case it was objected, that he was concluded by the terms of the charter-party, and fixed with the character of agent; so that he could sue only in that character, and consequently that there was a variance between the declaration and the proof. A verdict was found for the defendant, with liberty to enter a verdict for the plaintiff for £5 10s., if the court should be of opinion that he was entitled to sue as principal, notwithstanding the terms of the charter-party; and a rule nisi was obtained so to enter it. We are of opinion that the rule must be made absolute. It is conceded that if there had been a third party who was the real freighter, such third party might have sued, although his name was not disclosed in the charter-party; but the question is, whether the plaintiff can fill both characters of agent and principal, or rather whether he can repudiate that of agent and adopt that of principal, both characters being referred to in the charter-party, but the name of the principal not being therein mentioned.

"The cases principally relied on for the defendant were *Bickerton v. Bur-*

RIGHTS OF PRINCIPALS.

§ 188. *Rights of Principals.* Inasmuch as the principal is bound by the acts and contracts of his agents, within the scope

rell, 5 Maul. & Selw. 383, and Rayner v. Grote, 15 M. & W. 359, in both which cases the supposed principal was named in the instrument of contract; also the case of Humble v. Hunter, 12 Q. B. 310; 12 Jur. 1021. In the case of Bickerton v. Burrell, the plaintiff, on the face of the contract, professed to enter into it as agent for C. Richardson. At the trial, C. Richardson was called to prove that her name was used without her knowledge, and that she had nothing to do with the contract. Lord Ellenborough refused to receive the evidence, and nonsuited the plaintiff. A rule *nisi* to set aside the nonsuit was obtained, but, upon argument, was discharged, on the ground that a person who has exhibited himself as agent for another, *whom he names*, cannot at once throw off that character and put himself forward as principal, without any communication or notice to the other party. All the judges relied on the want of such notice, which seems to have been the chief ground of the decisions; for they considered that the defendant was thereby placed in great difficulty, as he had contracted, in point of law, with Richardson, and not with the plaintiff, and might have no means of ascertaining or even conjecturing that she was not the real party. The soundness of that ground of decision was somewhat doubted in the late case of Rayner v. Grote. There the plaintiff contracted as agent for Johnson, but was, in truth, himself the principal; he sued the defendant for not accepting and paying for the goods. The defendant had accepted and paid for a great part of the goods sold, and knew, before he refused the residue, that the plaintiff was the real principal; and so the case was distinguishable from that of Bickerton v. Burrell upon the very ground on which that decision proceeded, and the plaintiff was held to be entitled to sue. The case of Humble v. Hunter, was an action by Grace Humble, on a charter-party signed by her son, J. C. Humble, in which he was described as the 'owner of the good ship of vessel called the Ann.' There the son was called at the trial, and, after objection taken to his admissibility, proved that he executed as agent for the plaintiff, and the plaintiff had a verdict. The court, however, granted a new trial, on the ground that it was not competent for a third party to come in and claim to be the principal, and so contradict the express statement of the contract itself. The case turned upon the form of the contract; for it was conceded, that if the words 'owner of the good ship,' &c., had been omitted, the plaintiff might have sued, on showing that she was the real owner, and that the son was her agent only. Such evidence would not have contradicted the contract, but would only have let in a

of their authority, he has, also, a reciprocal right against third persons, coextensive with his own liability. Nor does it mat-

third party who was really interested, in conformity with the current of authorities in cases of contracts executed by agents, and in their own names. The case of *Jenkins v. Hutchinson*, 13 Jur. 763, was also cited for the defendant, but it proceeded on a different ground, and is not applicable to the present question. There the defendant was sought to be charged as principal on a charter-party, executed by him, on the face of it, as agent for Barnes; he had, in truth, no authority from Barnes, nor was he himself interested at all; and the court held that he could not be sued as principal without showing that he really was so.

“A distinction was taken on the argument in the present case, by the defendant's counsel, between an executed and an executory contract; and it was said, that whatever might be the rule in the former class of cases, where the defendant has received the benefit of the contract, and it is probably immaterial to him whom he pays, yet that in the latter class the defendant cannot be properly held answerable to B. having expressly contracted with A.; and a passage in the judgment of the court in the case of *Rayner v. Grote* was much relied on, which is this: ‘If, indeed, the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many cases, such as, for instance, the case of contracts, in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule.’ With this passage we entirely agree; but it is plain that it is applicable only to cases where the supposed principal is named in the contract; if he be not named, it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested.

“In the present case, the names of the supposed freighters not being inserted, no inducement to enter into the contract, from the supposed solvency of the freighters, can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have been sued on this charter-party. The defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to inquire who he was. It is, indeed, possible that he may have been contented to take any freighter and principal,

ter whether he were named or known to be the principal, nor whether the fact of agency were known.¹ He may, therefore, sue third persons, whenever they are at all responsible upon their contracts, made in the course of the agency;² unless the instrument be under seal, and be exclusively made with the agent, as a charter-party or bottomry bond;³ or unless exclu-

provided it was not the present plaintiff, and he may have relied on the terms of the charter-party, indicating that the plaintiff was an agent only, being willing to accept of any one else, be he who he might, as principal.

“After all, therefore, the question is reduced to this, whether we are to assume that the defendant did so rely on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be; and are to lay it down as a broad rule, that a person contracting as agent for an unknown and unnamed principal is precluded from saying, ‘I am myself that principal.’ Doubtless, his saying so does in some measure contradict the written contract, especially the concluding clause, which says, ‘This charter-party being concluded on behalf of another party,’ &c., for there was no such other party. It may be that the plaintiff entered into the charter-party for some other party who had not absolutely authorized him to do so, and afterwards declined taking it; or it may be that he intended originally to be the principal. In either case the charter-party would be, strictly speaking, contradicted; yet the defendant does not appear to be prejudiced, for as he was regardless who the real freighter was, it should seem that he trusted for his freight to his lien on the cargo. But there is no contradiction of a charter-party, if the plaintiff can be considered as filling two characters, namely, those of agent and principal. A man cannot, in strict propriety of speech, be said to be an agent to himself; yet in a contract of this description, we see no absurdity in saying that he might fill both characters — that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt that character of freighter himself if he chose. There is nothing in the argument that the plaintiff’s responsibility is expressly made to cease ‘as soon as the cargo is shipped,’ for that limitation plainly implies only to his character as agent, and, being real principal, his responsibility would unquestionably continue after the cargo was shipped.”

¹ Estate of Merrick, 2 Ashmead, R. 485; Hubbert v. Borden, 6 Whart. R. 79.

² Taintor v. Prendergast, 3 Hill, R. 72; Rutland Railroad v. Cole, 24 Verm. 33.

³ Shack v. Anthony, 1 M. & S. 573; Abbott on Shipp. Pt. 3, ch. 1, § 2, p. 163, 164, (1829); Tilson v. Warwick Gas Co. 4 B. & C. 962; Fletcher v. Gillespie, 3 Bing. 635.

sive credit be given to and by the agent, as in the case of a foreign factor;¹ or unless the agent have a lien or claim upon the property bought or sold, or upon its proceeds, exceeding the value thereof; in which case, the rights of the agent are paramount to those of the principal;² or unless payment and satisfaction have been already made to the agent, in which case he alone is responsible;³ or unless the agent have represented himself as principal, and the contract be with him expressly in such character.⁴ In such excepted cases the principal can neither sue or be sued.⁵

§ 189. Where the agent has either express or implied authority to receive or make payment, payments made to or by him are obligatory on the principal. But if the principal give notice to the payer not to pay his agent, and the payer actually pay, in violation of such notice, the principal may, nevertheless, recover the sum from such payer.⁶ Where, therefore, an agent, to get a note discounted, indorsed it and presented it for discount, as his own, and the bank discounted and passed the proceeds to his credit; it was held, that the bank was responsible to the principal therefor, after notice not to pay them to the agent.⁷ So, also, the principal is discharged from a debt to a third person, if it be paid by the agent; or if the third person accept a particular mode of payment, his only claim is against the agent.⁸ So, where payments have been made by

¹ Thomson v. Davenport, 9 B. & C. 87; Patterson v. Gandasequi, 15 East, 62; Addison v. Gandasequi, 4 Taunt. 574; Hyde v. Page, 9 Barb. 150.

² Story on Agency, § 160, 407, 408, 422, 423, 424.

³ Estate of Merrick, 2 Ashmead, R. 485; Hubbert v. Borden, 6 Whart. R. 79.

⁴ Humble v. Hunter, 12 Q. B. 310. See ante, § 187.

⁵ Story on Agency, ch. 16, per tot. See ante, § 186 to 188.

⁶ Favenc v. Bennett, 11 East, 38; Coates v. Lewes, 1 Camp. 441; Blackburn v. Scholes, 2 Camp. 341, 343; Morris v. Cleasby, 1 M. & S. 576; Pitts v. Mowes, 6 Shepley, R. 361.

⁷ Merrill v. Bank of Norfolk, 19 Pick. R. 32.

⁸ Seymour v. Pychlau, 1 B. & Ald. 14; Strong v. Hart, 6 B. & C. 160; Smith

the agent to the injury of the principal, the principal may recover the money so paid, when the whole consideration fails; or when it has been paid through mistake; or been illegally extorted; or where fraud and imposition have been practised;¹ or where the person to whom payment is made knows that the agent had no authority to pay it.²

§ 190. In cases of tort, if both the agent and third person be parties, the principal may have his remedy jointly and severally, against both. If the agent only be guilty, he only is responsible. If, however, the third person alone be guilty, he will be responsible to both principal and agent.³

DISSOLUTION OF AGENCY.

§ 191. In the next place, as to *Dissolution of Agency*. An agency may be dissolved in three ways; either by a revocation of the agent's power by the principal; or by a renunciation of such power by the agent; or by operation of law.

§ 192. A principal may, at any time, revoke the authority of his agent, when such authority has not been executed in part, and no injury is worked thereby.⁴ If, however, there be an express stipulation by the principal that the authority shall be irrevocable; or if the authority be given for a valuable consideration; or be coupled with an interest; or be part of a se-

v. Ferrand, 7 B. & C. 19; Porter v. Talcott, 1 Cow. 359; Story on Agency, § 431, and cases cited; Anderson v. Hillies, 10 Eng. Law & Eq. R. 495.

¹ Duke of Norfolk v. Worthy, 1 Camp. 337, 339; Dalzell v. Mair, 1 Camp. 532; Ancher v. Bank of Eng. Doug. 637; Treuttell v. Barandon, 8 Taunt. 100; Story on Agency, § 435.

² Amidon v. Wheeler, 3 Hill, R. 137.

³ Story on Agency, 436; Taylor v. Plumer, 3 M. & S. 562; Stevenson v. Mortimer, 2 Cowp. R. 806; Holt v. Ely, 18 Eng. Law & Eq. R. 424. See ante, § 180 c.

⁴ 2 Liverm. on Agency, 309; Story on Agency, § 462, 465; Smart v. Sanders, 5 Com. B. Rep. 895.

curity; the authority will be irrevocable, unless there be an express stipulation that it shall be revocable.¹ Thus, if a power of attorney be given to a creditor to sell lands, and to pay his debts out of the proceeds of the sale, it is irrevocable.² If the authority of the agent be executed in part, and that part be capable of severance, so as to work no injury to the agent, the revocation would be good as to the unexecuted part. But if the authority be partly executed, and be incapable of severance, without injury to the agent, the principal cannot revoke his authority, without fully indemnifying the agent.³

§ 193. An authority may be revoked either by a public and formal declaration; or by an informal instrument; or by word of mouth; or it may be implied from circumstances.⁴ Thus, if a person appoint another agent to do the same act, it may be construed to be a revocation of the former agent's authority.⁵ A revocation takes effect, so far as the agent is concerned, when he receives notice thereof; and, so far as third persons are concerned, when they receive notice thereof.⁶ Of course, whenever the power of the agent is revoked, that of his subordinate agents and substitutes is also revoked.⁷ Where an agency, constituted by writing, is revoked, if the

¹ Story on Agency, § 476, 477.

² *Gausson v. Morton*, 10 B. & C. 732. See also *Walsh v. Whitcomb*, 2 Esp. 565; *Hunt v. Rousmaniere*, 2 Mason, 244; *Id.* 342; s. c. 8 Wheat. 170; 1 Peters, 1.

³ Story on Agency, § 466, 467; *Hodgson v. Anderson*, 3 B. & C. 842; 2 Story on Eq. Jurisp. § 1041-1047.

⁴ Story on Agency, 474; *Morgan v. Stell*, 5 Binn. 305; *Copeland v. Merch. Ins. Co.* 6 Pick. 198.

⁵ *Morgan v. Stell*, 5 Binn. 305.

⁶ *Salte v. Field*, 5 T. R. 213; *Anon. v. Harrison*, 12 Mod. 346; Paley on Agency, by Lloyd, 188, 570; *Hazard v. Treadwell*, 1 Str. 506; 2 Liverm. on Agency, 306, 310; 2 Kent, Comm. Lect. 41, p. 644, 3d ed.; *Morgan v. Stell*, 5 Binn. 305; Story on Bail. 208.

⁷ Story on Agency, § 490.

written authority be left in the hands of the agent, and he subsequently exhibit it to a third person, who, on faith of it, innocently deals with him as agent, the principal will be bound, in like manner as if the revocation had not taken place, by all acts within the scope of the agent's authority conferred by the writing.¹

§ 194. Secondly. An agent may renounce his authority at any time. But, by so doing, he renders himself liable for all losses and damages accruing to his principal from his renunciation, unless the agency be purely voluntary and gratuitous.²

§ 195. Thirdly. The revocation may be by operation of law. And this may arise, either by the lapse of the time for which it was limited; as if it be created for a year, and the year elapse;³ or by a change of condition or of state, producing an incapacity in either party; as if an unmarried woman should execute a power of attorney, and then marry, or become insane; or if the principal should become bankrupt;⁴ or by the death of either party, or by the extinction of the subject-matter of the agency, or of the principal's power over it; or by the complete execution of the trust. Where the authority is revoked by the death of the principal, all acts done by the agent after such event will be void, although done in good faith, and in ignorance of the principal's death.⁵ There is but one ex-

¹ *Beard v. Kirk*, 11 N. Hamp. R. 398. See *Ryan v. Sams*, 12 Q. B. Rep. 460.

² Story on Bail, § 202; Story on Agency, § 478.

³ Story on Agency, § 480, et seq.

⁴ *Anon.* 1 Salk. 117, 399; 2 Kent, Comm. Lect. 41, p. 645, 3d ed.; *White v. Gifford*, 1 Roll. Abr. 331, tit. *Authoritie*, E. pl. 4; *Charnley v. Winstanley*, 5 East, 266; Story on Bail, § 206; *Hunt v. Rousmaniere*, 8 Wheat. 174, 201-204. See Story on Agency, § 481, and note; *Minett v. Forrester*, 4 Taunt. 541; *Parker v. Smith*, 16 East, 382; *Dixon v. Ewart*, 3 Meriv. 322.

⁵ *Rigs v. Cage*, 2 Humph. R. 350; *Peries v. Aycinena*, 3 Watts & Serg. 64; *Johnson v. Johnson*, Wright, R. 594; *Gale v. Tappan*, 12 N. Hamp. R. 145.

ception to this rule, which obtains in cases of incapacity and death, where the power or authority is coupled with an interest; upon the ground that the authority may still be executed by the agent, notwithstanding the incapacity or death of the principal, and notwithstanding the legal incapacity of the agent.¹ Thus, if an unmarried woman be made an agent, and afterwards marry, she may still be an agent, unless prohibited by her husband.² So, also, although insanity generally operates as a revocation of the agency, it has not this effect in cases where a power is coupled with an interest, so that it can be exercised in the name of the agent.³

¹ Story on Agency, § 483, 484, 485, 489; *Davis v. Lane*, 10 N. Hamp. R. 156.

² Co. Litt. 52a; Com. Dig. Attorney, c. 4; *Id. Baron et Feme*, D.

³ *Davis v. Lane*, 10 N. Hamp. R. 156.

CHAPTER IV.

CONTRACTS OF PARTNERS.

§ 196. WE now proceed to the consideration of special contracts of agency, in which the powers, duties, and liabilities of the parties are modified by their peculiar relationship. This class we shall divide into the following classes: 1st, Partners; 2d, Executors and Administrators; 3d, Trustees; 4th, Guardian and Ward; 5th, Corporations; 6th, Auctioneers; 7th, Brokers and Factors; 8th, Consignees; 9th, Supercargoes; 10th, Ships-Husbands; 11th, Masters of Ships.

§ 197. The law relating to PARTNERSHIP differs from the general law relating to agency principally in the fact, that each partner has an interest in common with the other partners, in the whole property, business, and responsibilities of the partnership; which a mere agent has not.

§ 198. A partnership is a contract to share the profits of any business. As between the parties thereto, it cannot be created by the mere operation of law, but depends solely upon the fact of agreement. No third person can be introduced into a firm, but with the consent of the other partners.¹ Neither a joint tenancy, nor a tenancy in common, of itself,

¹ Story on Partnership, § 5; Collyer on Part. b. 1, ch. 1, § 1, p. 4, 5, 2d ed.; Ex parte Barrow, 2 Rose, Cas. 252, 255; Crawshay v. Maule, 1 Swanst. 508, 509, and the learned note of the reporter, p. 509.

constitutes a partnership; and, therefore, the representative of a surviving partner does not become one of the firm.¹

§ 199. The same rules which apply to the capacity of persons to contract generally, apply to the parties to the particular contract of partnership.²

§ 200. The consideration, on which the contract of partnership is founded, may be either money or property, or mere labor or skill.³ In every partnership, where there is any property, it is common stock, and is first liable for the partnership debts. After they are paid, and the partnership dissolved, it is subject to a division among the members, or their representatives, according to agreement.⁴

§ 201. Partnerships are either universal, general, or limited and special. The first species is where all the property, labor, and skill of both parties are employed for their mutual benefit. The second species is, where the partnership is confined to general business. The third species is, where the partnership is limited to some one branch of business. Partnerships are also either private partnerships, or joint-stock companies, either incorporated or unincorporated. There is no difference between them, except that corporations are governed strictly by the terms of their charter, and the stockholders or shareholders are not personally liable for the acts or contracts of the officers or members, unless expressly declared to be so by their charter.⁵ So, also, there are ostensible partners, who are and

¹ *Pearce v. Chamberlain*, 2 Ves. 33; Story on Part. § 3; 3 Kent, Comm. Lect. 43, p. 25.

² Story on Partnership, ch. 2, per tot. Ante, ch. 2, per tot.

³ Story on Part. § 16; 3 Kent, Comm. Lect. 43, p. 25; Puffendorf, *Droit de La Nat. Lib.* 5, ch. 8, § 1; Pothier, *Contrat de Société*, No. 1; *Dob v. Halsey*, 16 Johns. 34.

⁴ 2 Kent, Comm. Lect. 43, p. 24; Story on Part. § 16.

⁵ See Post, *Corporations*.

appear as partners ; nominal partners, who appear as partners, but are not ; and dormant or secret partners. Partnerships may be created in regard to any business, except a mere personal office of trust ; and may be created by deed, by parol, or by tacit assent.¹

§ 202. We propose to consider, first, what constitutes a partnership, as between the partners ; and second, what constitutes a partnership as to third persons.

§ 203. Wherever there is both a community of interest, in the capital stock and in the net profits, the contract of partnership is created so as to bind the partners. It is not, however, necessary, that both of these circumstances should concur, in order to constitute a partnership ; for even if the whole capital stock be the exclusive property of one of the parties, yet if there be a community of profit and loss, the parties will be partners. So, also, there are some partnerships, where there is no common property, or stock employed in the business ; as in the case of mere factors or brokers. If there be no agreement, express or implied, as to the partnership property, it will be considered as the common stock of both parties ; and if there be no agreement as to the proportional share of the profits, which each partner shall receive, both partners are to share equally.² This last presumption would only seem to arise where there is not only no actual contract as to the apportionment of profits, but no evidence growing out of the modes of dealing of the parties, or of the books and accounts, from which a contract might be inferred.³ If, however, the agree-

¹ Story on Part. ch. 5 ; U. S. Bank *v.* Binney, 5 Mason, 176, 183.

² Reid *v.* Hollinshead, 4 B. & C. 867 ; Collyer on Part. b. 2, ch. 1, § 2, p. 112, 113, 2d ed. ; Ex parte Gellar, 1 Rose, 297 ; Musier *v.* Trumpbour, 5 Wend. 274 ; Everitt *v.* Chapman, 6 Conn. 347 ; 3 Kent, Comm. Lect. 43, p. 24, 25 ; Story on Part. § 27, 28.

³ See Stewart *v.* Forbes, 1 Hall & Twells, R. 472 ; s. c. 1 McNaught. & Gord. R. 137. In this case Lord Cottenham, referring to the case of Pea-

ment express in terms, that the property is furnished by one partner, and the parties are to have a community of interest in the net profits, it will constitute a partnership only as to the profits.¹ But wherever the parties themselves do not intend to create a partnership, they will not be responsible to each other as partners; for the intent is the key to the contract.²

§ 204. This brings us to the consideration of what constitutes a *partnership as to third persons*; and in these cases the real intent of the parties constitutes no criterion of responsibility, for the law will not permit them, by a private arrangement, to limit their responsibility to others. Whatever may be their intent, therefore, a partnership will be created between themselves as to third persons, unless the whole arrangement and agreement between them either exclude some of the essential ingredients of a partnership; or unless it be clearly a case of mere agency, or joint tenancy.³ Thus, if A. and B. should

cock v. Peacock, 2 Camp. R. 45, where Lord Ellenborough held, that in the absence of all positive stipulations in the particular case, a presumption of an equal division of profit would arise, said: "In that case it was properly held, that in the absence of any contract between the parties, or any dealing from which a contract could be inferred, it would be assumed, that the parties had carried on business on terms of an equal partnership. . . . But what would have been the decision in *Peacock v. Peacock*, if the books and accounts, instead of absolute silence as to the shares of the partners in each year, had described the shares in which the partners were interested in the business, and had attributed to the plaintiff four sixteenths only of the shares of the business? These entries are as conclusive of the rights of the parties as if they had been found prescribed in a regular contract." See also *Thompson v. Williamson*, 7 Bligh, R. 432; *Webster v. Bray*, 7 Hare, R. 177; *Story on Partnership*, § 24, and notes.

¹ *Meyer v. Sharpe*, 5 Taunt. 74; *Smith v. Watson*, 2 B. & C. 401; *Hesketh v. Blanchard*, 4 East, 144; *Ex parte Hamper*, 17 Ves. 404; *Mair v. Glennie*, 4 M. & S. 240; *Hall v. Leigh*, 8 Cranch, R. 50; *Story on Part.* § 27.

² *Wish v. Small*, 1 Camp. 331, note; *Dry v. Boswell*, 1 Camp. 329, 330; *Story on Part.* § 30; *Hazard v. Hazard*, 1 Story, R. 371.

³ *Story on Part.* § 30 et seq.; 3 Kent, Comm. Lect. 44, p. 25, 26; *Coope v. Eyre*, 1 H. Bl. 37; *Gow on Part.* ch. 1, p. 10, 11, 3d ed.; *Id.* ch. 4, p. 153;

agree to carry on business for their joint profit, and to divide the profits between them, but B. should bear all the losses, and should agree, that there should be no partnership between them, as to third persons dealing with the firm, they would be held partners, although *inter sese*, they would be held not to be partners.¹ The existence of a partnership cannot, however, be proved by the profession or act of one only, if proof of the acknowledgment and admission of the others whom he professes to be his copartners cannot be made out actually or by implication.² But successive acts or declarations or acknowledgments made by each of several defendants, tending to show a partnership, are admissible, and are equivalent to a joint declaration.³

§ 205. In all cases, where a partnership is created by agreement between the parties themselves, they are liable, as partners, to third persons. Their public liability, however, extends far beyond their private liability to each other, and may arise in contravention of their mutual intent, and in cases where, as between themselves, they would not be partners. Their liability, as partners, to third persons, may arise in two ways; either by a participation in the profits of the partnership, or by holding themselves out as partners.⁴

Smith v. Watson, 2 B. & C. 401; Harding v. Foxcroft, 6 Greenl. 76; Jackson v. Robinson, 3 Mason, 138; Hoare v. Dawes, Doug. 371; Post v. Kimberly, 9 Johns. 470; Holmes v. United Ins. Co. 2 Johns. Cas. 329; Gibson v. Lupton, 9 Bing. 297; Hall v. Leigh, 8 Cranch, 50.

¹ Per Mr. Justice Story, in Hazard v. Hazard, 1 Story, R. 371, and cases cited there. See also Waugh v. Carver, 2 H. Black. R. 235; Hesketh v. Blanchard, 4 East, R. 144; Dob v. Halsey, 16 Johns. R. 34; Cheap v. Cramond, 4 Barn. & Ald. 663.

² Welsh v. Speakman, 8 Watts & Serg. 257.

³ Ibid. Haughey v. Strickler, 2 Watts & Serg. 411.

⁴ 3 Kent, Comm. Lect. 43, p. 32, 33, 4th ed.; Waugh v. Carver, 2 H. Bl. 235, 246; Post v. Kimberly, 9 Johns. 489; Ex parte Watson, 19 Ves. Jr. 458; Fox v. Clifton, 6 Bing. 776; Parker v. Barker, 1 Bro. & Bing. 9; Goode v. Harrison, 5 B. & Ald. 147; Bond v. Pittard, 3 Mces. & Welsb. 357; 2 Bell, Comm. b. 7, ch. 2, p. 623, 624, 5th ed.

§ 205 *a*. First. Whether persons be actually partners or not, they will be responsible as partners to all persons to whom they hold themselves out by their words or conduct, as such.¹ And if a person should, either by expressly professing to be a partner when he is not, induce any one to credit the partnership, or should, after his withdrawal from the firm, permit his name to be used by them, he would be personally liable.² The fact that persons conduct business as if they were copartners, is sufficient *primâ facie* evidence of a copartnership, and no written articles are necessary.³

§ 206. Second. Whenever a party receives a proportional share of the *net* profits of the partnership, however small it may be, he is liable to third persons as a partner, whether he have any interest in the property of the partnership, or not. Neither, in such case, does it make any difference, whether or not there be an express agreement between the parties, not to be liable as partners; for that agreement would only limit their responsibility to each other. If there be a participation in the profits, after deducting the losses, the parties will be liable as partners to third persons, whatever be the mode of apportioning the share of each. An agreement, therefore, that one party shall receive a compensation proportioned to the net profits, creates the same liability, as if the agreement were, that he should receive a direct share in them. The reason upon which this rule is founded, is, that a mutual interest in the net profits would entitle each party to an account, and would give each a specific lien for his proportion, or a preference in payment over the other creditors. Therefore, in case

¹ Ibid. Stearns *v.* Haven, 14 Verm. R. 540; Benedict *v.* Davis, 2 M'Lean, R. 317; Perry *v.* Randolph, 6 Smedes & Marsh. 335.

² Stearns *v.* Haven, 14 Verm. R. 540; Story on Part. § 65; Young *v.* Axtell, cited 2 H. Black. R. 242; Grudon *v.* Robson, 2 Camp. R. 302; Whitman *v.* Leonard, 3 Pick. R. 177; Griswold *v.* Waddington, 15 Johns. R. 57; Casco Bank *v.* Hills, 4 Shepl. R. 155.

³ Forbes *v.* Davison, 11 Verm. R. 660; Gilbert *v.* Whidden, 7 Shepl. R. 367; Griffin *v.* Doe, 12 Ala. R. 783.

of loss, as his security would be increased, his liabilities ought also to be extended.¹

§ 207. But if two or more parties participate in the *gross* profits of a partnership, by which is meant the profits before the losses are deducted, or the gross receipts, although the presumption is, that they are partners, it may be repelled by clear proof of a different intention and understanding between them. Nor does the mere mode of participating in gross profits alter the liabilities of the parties; for if a person receive a certain compensation for his labors or services proportioned to the gross profits, or in the nature of a commission upon them, he will not be considered as a partner, if it be distinctly proved that the contract was intended to be one of mere agency, and that the participation in gross profits was only designed as a convenient mode of estimating the compensation of the agent. The reason upon which this rule is said to be founded, is, that a compensation fluctuating with the profits, and uninfluenced by the losses, gives a person no direct interest in the profits, sufficient to entitle him to an account, or to give him a lien for his share, and therefore works no injury to the other creditors.²

¹ *Bond v. Pittard*, 3 Mees. & Welsb. 357; *Dry v. Boswell*, 1 Camp. 329, 330; *Waugh v. Carver*, 2 H. Bl. 235, 246; *Ex parte Rowlandson*, 1 Rose, 89, 92; *Coll. on Part. b. 1*, ch. 1, § 1, p. 24, 229, 2d ed.; *Miller v. Bartlett*, 15 Serg. & Rawle, 137; *Ex parte Hamper*, 17 Ves. 404; *Ex parte Watson*, 19 Ves. Jr. 461; *Turner v. Bissel*, 14 Pick. 192; *Loomis v. Marshall*, 12 Conn. 69; *Champion v. Bostwick*, 18 Wend. 175, 184; *Cary on Part. 11*, containing a defence of the principle; *Perrine v. Hankerson*, 6 Halst. 181. See cases cited in next note. *Bucknam v. Barnum*, 15 Conn. R. 67; *Cushman v. Bailey*, 1 Hill, R. 526.

² A lay or share in the proceeds or catchings of a whaling voyage does not create a partnership in the profits of the voyage, but is in the nature of seamen's wages, and is governed by the same rules. See *Coffin v. Jenkins*, 3 Story, R. 112; *Wilkinson v. Frazier*, 4 Esp. R. 182; *Perrott v. Bryant*, 2 Younge & Coll. 61; *Baxter v. Rodman*, 3 Pick. R. 435; *Grozier v. Atwood*, 4 Pick. R. 234; *Rice v. Austin*, 17 Mass. R. 195, 203; *The Frederic*, 5 Rob. R. 8.

§ 208. The distinction is between a participation in the *net* profits, whether by a compensation proportioned thereto, or by a direct share therein, on the one hand, which will render a party, so partaking, a partner; and a participation in the *gross* profits or receipts, whether it be direct, or by a compensation, graduated by the gross profits indeed, but in its nature excluding the idea of partnership, which will not render the parties liable as partners.¹

¹ The cases on this point are exceedingly contradictory and confusing, and the distinctions so subtle, that they are hardly perceptible. The distinction is stated to be between "an interest in the profits themselves, *as profits*, and the payment of a given sum of money, in a proportion to a given quantum of the profits; as the reward of, and as a compensation for labor and services." Gow on Part. ch. 1, p. 18, 3d ed. Lord Eldon uses similar language, in *Ex parte Hamper*, 17 Ves. 404, where he says: "The distinction is so thin, that I cannot say it is established upon due consideration." See also *Ex parte Rowlandson*, 1 Rose. R. 89, 91, 92. It seems rather difficult, however, to perceive any essential difference between the two cases. Is it not the same thing, in its practical operation, to receive a certain proportion of the profits, or to receive a certain sum proportional to the profits? In each case, there is actually the same interest in the amount of profits; the share or compensation fluctuates with the profits; and the result is the same. If a person is to receive twenty per cent. on the profits, is it not the same thing, as if he is to receive twenty cents on every dollar of the profits? And yet this illustration answers the distinction. This whole distinction is utterly unfounded in legal principle, and unsupported by any reason of public policy. The equitable rule of construction, and that which obtains in all other contracts is, that the intention of the parties shall furnish the key of their contract; and that no agreement shall be construed in contradiction of such intention, if it be apparent. This rule is applied to the contract of partnership, whenever the question is between the parties themselves; but whenever the question is in respect of their liabilities to third persons, an artificial rule is introduced, contradicting the general rule of interpretation, and of a purely arbitrary nature. This rule, having been once founded could not easily be overthrown; but common sense, struggling hand in hand with common law, and rebelling against so artificial a doctrine, created a distinction, by which it was enabled again to replace the equitable rule of interpretation, which had been ejected by the exception. This distinction, however, is so subtle, as to create more difficulty than even the arbitrary rule. Although it is manifest, that its operation, in relation to persons receiving a compensation proportioned to profits, so

§ 208 *a*. Again, it would seem, where an arrangement is made, by which a party undertaking labor and services in respect to a business, is to receive, by way of compensation, a certain share of the gross profits, after certain specified deductions are made, but is not to be rendered liable for any losses, or to be entitled to an account or specific lien or preference in payment, that the contract of partnership is not created.¹ In such a case, where the party has no responsibilities for losses as partner, compensation would be received by him solely in the character of agent, and not of partner.²

§ 209. An agreement between several persons to make a

far from being anomalous, is, in reality, in coincidence with the general doctrines of interpretation. The contradiction in the cases, grows out of a desire of reconciling the exception with the general rule. There seems, in truth, to be no possible ground for the exception; for the intention of the parties at once distinguishes cases of mere agency from those of partnership, and is the only sound test of liability.

The doctrine is, however, well settled, and is as stated in the text. See *Grace v. Smith*, 2 W. B. 998; *Story on Partnership*, § 23 to 38, note 2 to § 36; *Waugh v. Carver*, 2 H. B. 244, 245; *Bond v. Pittard*, 3 Mees. & Welsb. 357; *Cheap v. Cramond*, 4 B. & Ald. 663, 670; *Saville v. Robertson*, 4 T. R. 720; *Cutler v. Windsor*, 6 Pick. 305; *Bailey v. Clark*, 6 Pick. 372; *Turner v. Bissell*, 14 Pick. 193; *Chase v. Barrett*, 4 Paige, 148, 159. See, however, *Thompson v. Snow*, 4 Greenl. 264, and *Loomis v. Marshall*, 12 Conn. 69. But see *Hasketh v. Blanchard*, 4 East, 144, 146; *Mair v. Glennie*, 4 M. & S. 240; *Wish v. Small*, 1 Camp. 301, note; *Perrott v. Bryant*, 2 Younge & Coll. 61, 67, 68; *Withington v. Herring*, 3 Moore & Payne, 30; *Champion v. Bostwick*, 18 Wend. R. 175, 184. See also the cases cited in relation to this subject, in *Story on Partnership*, ch. 4; and particularly *Pearson v. Skelton*, 1 Mees. & Welsb. 504; s. c. *Tyrwh. & Grang.* 848, in which the criterion of partnership is clearly pointed out as being in a participation in the net profits, or a participation in the gross profits or receipts. See also *Denny v. Cabot*, 6 Metcalf, R. 90; *Cutler v. Windsor*, 6 Pick. R. 335.

¹ *Denny v. Cabot*, 6 Metcalf, R. 82; *Bradley v. White*, 10 Metcalf, R. 304, 305. See also *Polt v. Eyton*, 3 Man. Grang. & Scott, R. 32; *Dunham v. Rogers*, 1 Barr, R. 255; *Rawlinson v. Clarke*, 15 Mees. & Welsb. 292; *Rice v. Austin*, 17 Mass. R. 197.

² *Ibid.* See also *Vanderburgh v. Hall*, 20 Wend. R. 70; *Turner v. Bissell*, 14 Pick. R. 192; *Loomis v. Marshall*, 12 Conn. R. 69.

joint purchase of goods, does not make them partners, unless they are to be jointly concerned in the net profits arising from the subsequent disposal of them.¹ Thus, where three persons agreed to purchase a quantity of oil, one of them to take one fourth, a second to take one fourth, and the third, whom they empowered to purchase, to take the remaining two fourths, it was held, that this did not make them partners.²

§ 210. Again, an agreement between several parties to become partners at some future time, or communications and agreements with a view to the future formation of a partnership, or conditional agreements to become partners, do not constitute the parties partners, until the time appointed for the actual commencement of the partnership, or the happening of the condition.³

RIGHTS AND INTERESTS OF PARTNERS IN PARTNERSHIP PROPERTY.

§ 211. Partners differ from part owners of goods and chattels, in several respects. The latter are either joint-tenants, or tenants in common, possessing at least an independent, although an undivided interest in the property. Partners, however, are neither joint-tenants, nor tenants in common; for, in the first place, both joint-tenants, and tenants in common, have only the power of disposing of their own interest, while partners can dispose of the whole right of all the partners, for partner-

¹ *Grace v. Smith*, 2 W. Black. R. 1001; *Hoare v. Dawes*, 1 Doug. R. 373; *Domat, De la Société*, Liv. 1, tit. 8, s. 3, 7; 1 *Œuvres de Domat*, p. 265, 266.

² *Coope v. Eyre*, 1 H. Black. R. 37. See also *Dunham v. Rogers*, 1 Penn. State R. 255.

³ *Dickinson v. Valpy*, 10 Barn. & Cres. 142; *Bourne v. Freeth*, 9 Barn. & Cres. 640; *Meigh v. Clinton*, 11 Adolph. & Ell. 418; *Fox v. Frith*, 10 Mees. & Welsb. 131; *Fox v. Clinton*, 6 Bing. R. 776; *Gabriel v. Evill*, 9 Mees. & Welsb. 297; *Bateley v. Bailey*, 1 Scott, N. R. 143; *Walstal v. Spotteswood*, 15 Law Journ. N. S. Excheq. 198.

ship purposes; and in the name of the firm. So, also, joint-tenants have the right of survivorship, which partners have not.¹ Neither are partners tenants in common; for, in a tenancy in common, each party possesses an undivided moiety of the whole property; and not the whole of an undivided moiety of the property; whereas, in partnership, the partners are joint owners of the whole.²

§ 212. Partnership property may consist of real estate, leases of land, capital stock and funds, and debts due to the partnership, and indeed of all real or personal estate, purchased or employed for partnership purposes.³ So, also, the goodwill of a trade or business is considered as a part of the property.⁴

§ 213. All partnership property, whether it be real or personal, is considered as mere personalty, in equity; and although the legal title to real estate is in him, in whose name it stands, yet, if the equitable title be in the partnership, the per-

¹ See *Buckley v. Barber*, 1 Eng. Law & Eq. R. 506.

² Bac. Abr. Joint-Tenancy, and Tenancy in Common, C.; Co. Litt. 186 a; 2 Black. Comm. 182, 183, 184, 399; Comm. Dig. Estate, K. 3, K. 4, Accompt, B.; Watson on Part. ch. 2, p. 65, 2d ed.; Gow on Part. ch. 2, § 1, p. 32, 3d ed.; 3 Kent, Comm. Lect. 43, p. 36, 37; *West v. Skip*, 1 Ves. Jr. 240, 242; *Jackson v. Jackson*, 7 Ves. Jr. 535; 9 Ves. 591; *Hall v. Digby*, 4 Bro. Parl. R. 224; s. c. 4 Bro. Parl. Cas. by Tomlins, 577; Coll. on Part. B. 2, ch. 1, § 1, p. 80, 81, 2d ed.; Story on Part. § 89, 90.

³ *Featherstonehaugh v. Fenwick*, 17 Ves. 298; Story on Part. § 98, 99; Coll. on Part. B. 2, ch. 1, § 1, 76 to 84, 101, 2d.; *Jackson v. Jackson*, 7 Ves. Jr. 535; 9 Ves. 591; *Elliott v. Brown*, 9 Ves. 597, 3 Swanst. R. 490, note; Gow on Part. ch. 2, § 1, p. 32 to 34; 1 Story, Eq. Jurisp. § 674.

⁴ *Cruttwell v. Lye*, 17 Ves. Jr. 386; *Coslake v. Till*, 1 Russ. 376; *Dougherty v. Van Nostrand*, 1 Hoff. 68; *Hammond v. Douglass*, 5 Ves. 539. But see *Crawshay v. Collins*, 15 Ves. Jr. 218, where Lord Eldon doubts, whether the goodwill survives, as part of the partnership stock, to which the personal representatives have no right. Gow on Part. ch. 5, § 4, p. 349; Coll. on Part. B. 2, ch. 1, § 1, p. 102, 103, 2d ed.; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Harrison v. Gardner*, 2 Madd. 198; *Kennedy v. Lee*, 3 Meriv. 441.

son holding it is considered as the trustee of partners. And if there be any agreement, by which such real property is to be used for the purposes of the partnership, it will always be treated as personalty belonging to the partnership stock, and as such, descending to the executor and administrator.

§ 214. But, whether the same rule will apply, when there is no such agreement, is not perhaps entirely settled. The decisions are contradictory; but the weight of authority in equity is in favor of treating as personalty all real estate, held for partnership purposes, or as part of the partnership stock.¹

§ 215. Partnership property must first be applied to the discharge of partnership debts and liabilities, before any one partner, or his personal representatives, or individual creditors, can claim any right or title thereto.² Each partner has a specific

¹ See Story on Part. § 93, 94, and note. Chancellor Kent in his Comm. vol. 3, p. 37 to 40, 4th ed., is of opinion that the same rule will apply, whether there is an agreement or not; and equity will consider the person in whom the real estate is vested, as trustee for the partnership. So, also, Lord Eldon, *Selkrig v. Davies*, 2 Dow. Parl. R. 231, held the same doctrine, and affirmed it in *Townshend v. Devaynes*, 3 Bro. Ch. R. 199, Belt's note, 1. So, also, Sir John Leach in *Fereday v. Wightwick*, 1 Russ. & Mylne, 45, and *Phillips v. Phillips*, 1 Mylne & Keen, 649, and *Broom v. Broom*, 3 Myl. & Keen, 443, was of the same opinion. See also, *Dyer v. Clark*, 5 Metcalf, 562. So, also, Mr. Baron Alderson, in *Morris v. Kearsley*, 2 Younge & Coll. 139; *Goodburn v. Stevens*, 5 Gill, 1; *Buckley v. Buckley*, 11 Barb. S. C. R. 44; *Rice v. Barnard*, 20 Verm. 479; *Owen v. Collins*, 23 Ala. 837; *Dalmonies v. Guillaume*, 2 Sandf. Ch. R. 336; *Pierce v. Trigg*, 10 Leigh, 427; *Peck v. Fisher*, 7 Cush. 386. But the opposite doctrine was maintained by Lord Thurlow, in *Thornton v. Dixon*, 3 Bro. Ch. R. 199, and Belt's note, and by Sir William Grant, in *Bell v. Phyn*, 7 Ves. 453, and *Balmain v. Shore*, 9 Ves. Jr. 501; and by the present vice-chancellor, Sir L. Shadwell, in *Cookson v. Cookson*, 8 Sim. R. 529. See Coll. on Part. B. 2, ch. 1, § 1, p. 82 to 102, containing a full discussion of the whole doctrine. 2 Bell, Comm. B. 7, ch. 1, p. 613 to 615, 5th ed.; Gow on Part. ch. 2, p. 32 to 35; Watson on Part. ch. 2, p. 81 to 89, 2d ed.

² *Buchan v. Sumner*, 2 Barb. Ch. R. 165; *Geortner v. Trustees of Canajoharie*, 2 Barb. S. C. R. 625.

lien, therefore, on the present and future partnership property, not only for the debts due to third persons, but for his own share in the capital stock and funds; and for all moneys advanced by him on account of the firm; and for all moneys taken by any partner, over and above his share. And wherever partnership property has been converted by a partner to his own use, it may be applied to the payment of partnership debts, before it can be applied to the payment of personal and private debts, whether its character and identity be changed or not.¹

AUTHORITY AND LIABILITY OF PARTNERS.

§ 216. In the next place as to the *Authority and Liability of Partners*. — Each partner is the general agent of the firm. For all purposes connected with the partnership, therefore, he may dispose of the whole, or any part of the personal property belonging thereto, in like manner, as if he were sole owner. So, all transactions by a partner, as agent of the firm,² will bind a firm, notwithstanding the objections of the other partners.³ This rule applies to all cases, whether the partners be ostensible, nominal, or dormant;⁴ for if any one be held out as a partner, and he

¹ *Ex parte Ruffin*, 6 Ves. Jr. 119, 126; *Coll. on Part. B. 2*, ch. 1, § 1, p. 77, 2d ed.; *West v. Skipp*, 1 Ves. 239, 242; *Skipp v. Harwood*, 2 Swanst. 586; *Croft v. Pyke*, 3 P. W. 180; *Watson on Part. ch. 2*, p. 66, 2d ed.; *Ridgely v. Carey*, 4 Harr. & McHen. 167.

² *Story on Part. § 94*, 101; 3 Kent, *Comm. Lect. 43*, p. 44, 4th ed.; *Watson on Part. ch. 2*, p. 91 to 93, 2d ed.; *Gow on Part. ch. 2*, § 2, p. 57, to 54, 3d ed.; *Coll. on Part. B. 3*, ch. 1, § 1, p. 263 to 268, 2d ed.; *Fox v. Hanbury*, Cowp. 445; *Coles v. Coles*, 15 Johns. 159, 161; *Anderson v. Tompkins*, 1 Brock. Circ. R. 456.

³ *Wilkins v. Pearce*, 5 Denio, R. 541; *Sage v. Sherman*, 2 Comstock, R. 418.

⁴ *Swan v. Steele*, 7 East, 210; *Sandilands v. Marsh*, 2 B. & Ald. 673; *U. S. Bank v. Binney*, 5 Mason, 176; *Winship v. Bank of U. S.* 5 Peters, 529; *Coll. on Part. B. 3*, ch. 1, p. 259; *Watson on Part. ch. 4*, p. 166, 167, 2d ed.; *Gow on Part. ch. 2*, § 2, p. 36, 37, 3d ed.; *Coll. on Part. B. 2*, ch. 2, § 1, p. 128, 129; *Story on Part. § 103*, 104; *Tams v. Hitner*, 9 Barr, R. 441.

be trusted upon faith in such representation, not to hold the partnership liable, would be a fraud upon the public; and if he be actually a partner, there is no reason, why the other partners should not be responsible for acts done by him as their agent. A partner, therefore, would have full power without the consent or knowledge of his copartners to mortgage or sell all the stock in trade by his contract.¹ And if money be borrowed by one of the partners on the credit of the firm, all the partners are liable although he misappropriate the money.²

§ 217. One partner does not, however, by virtue of his partnership, possess authority to sign and seal deeds for the others; and, therefore, in a conveyance of real estate, all the partners must join or the deed will only operate as a conveyance of the separate interest of the actual grantors.³

§ 218. The authority of each partner to bind his copartners, being coextensive with those of a general agent of the firm, is subject, also, to the same limitations, as those which apply to cases of general agency. It must, therefore, be restricted in its exercise, to such transactions as arise in the ordinary course of the business carried on by the partnership. But he will be authorized to follow any particular mode or course of dealing, if it be justified by the usage of trade; or expressly authorized; or be implied from the circumstances of the case.⁴ Thus,

¹ *Tapley v. Butterfield*, 1 Metcalf, R. 515; *Arnold v. Brown*, 24 Pick. R. 89; *Hennessy v. The Western Bank*, 6 Watts & Serg. 300; *Greely v. Wyeth*, 10 N. Hamp. R. 15; *Lawrence v. Taylor*, 5 Hill, R. 107; *Anderson v. Tompkins*, 1 Brock. 456; *Halstead v. Shepherd*, 23 Ala. 558.

² *Onondaga Bank v. De Puy*, 17 Wend. R. 47. See post, § 224; *Emerson v. Harmon*, 2 Shepley, R. 271.

³ *Coles v. Coles*, 15 Johns. R. 159; Story on Part. § 94.

⁴ See ante, Agency; Story on Part. § 111, et seq. § 127, 128; *Sandilands v. Marsh*, 2 B. & Ald. 678; *Payne v. Ives*, 3 Dowl. & Ryl. 664; *Collyer on Part. B.* 3, ch. 1, § 3, p. 279, 280, 281; *Crawford v. Stirling*, 4 Esp. 207; *Hope*

in a mercantile partnership for commercial purposes, the right of each partner to pledge the credit of the firm grows out of the general usage and law merchant, and is implied in the very object of the partnership. And in such cases, therefore, one partner may, by drawing or indorsing promissory notes, or accepting bills of exchange or other negotiable securities, or by any other acts appropriate and incident to the business, bind the firm.¹ But if a partnership be organized for farming or mining purposes, the directors or agents thereof will not, as incident thereto, possess a power to draw, or accept bills, or to draw and indorse notes for the company;² for such powers do not necessarily or naturally grow out of a partnership for those purposes. So, also, where it is not in the common course of the business to give letters of credit or of guaranty, one partner could not bind the firm by the letters of credit or guaranty,³ drawn by him. In such cases, therefore, either an express authority, or usage, or extraordinary exigencies, must be proved.⁴

§ 218 *a*. Again, all acts and contracts intended by a partner

v. Cust, cited 1 East, 53; *Ex parte Nolte*, 2 Glyn & Jam. 306; *Sutton v. Irwine*, 12 Serg. & R. 13; *Hamill v. Purviss*, 2 Penn. 177; *Duncan v. Lowndes*, 3 Camp. 478; *Dickinson v. Valpy*, 10 B. & C. 128; *Dob v. Halsey*, 16 Johns. R. 38; *Shirreff v. Wilks*, 1 East, 52; *Mullett v. Hutchison*, 7 B. & C. 639; *Thicknesse v. Bromilow*, 2 Crompt. & Jerv. 425; *Greenslade v. Dower*, 7 B. & C. 635; 3 Kent, Comm. Lect. 43, p. 46, 4th ed.; 2 Bell, Comm. B. 7, p. 618, 5th ed.

¹ Story on Part. § 102; 3 Kent, Comm. Lect. 43, p. 40 to 42, and cases cited; *Winship v. Bank of U. S.* 5 Peters, R. 529; *U. S. v. Binney*, 5 Mason, R. 176; s. c. 5 Peters, R. 529; *South Carolina Bank v. Case*, 8 Barn. & Cres. 427; *Fisher v. Tayler*, 2 Hare, R. 218.

² *Headley v. Bainbridge*, 2 G. & D. 483; *Levy v. Pyne*, 1 Carr. & M. 453.

³ *Hope v. Cust*, 1 East, R. 53; *Duncan v. Lowndes*, 3 Camp. R. 478; *Hasleham v. Young*, 5 Adolph. & Ell. N. S. 833.

⁴ *Wilson v. Williams*, 14 Wend. R. 146; *Catskill Bank v. Stall*, 15 Wend. R. 364; *Mayberry v. Bainton*, 2 Harring. R. 24; *Mauldin v. Branch Bank*, 2 Ala. R. 502. See *Darling v. March*, 22 Maine, 188; *Rollins v. Stevens*, 31 Maine, 454.

to bind the firm must be made in its name, or they will ordinarily be considered as his private act and contract.¹ It is not necessary, however, that the name of the firm should be signed, provided it appear on the face of the written contract or note, that it is to be for partnership purposes.² Yet if the partner authorized to draw a bill of exchange in behalf of this firm, make it in his own sole name, and there is nothing to show that it was on partnership account, the partnership is not bound thereby, even though the bill be made for a partnership purpose.³ For when credit is given solely to the individual partner, no partnership liability arises. And where a partnership is carried on in the name of one partner, in order to bind the firm on contracts signed by him, it is necessary to show that the signature was intended to bind the firm,⁴ and that the transaction was for partnership purposes, and within his authority; — and the burden of proof is on the creditor.⁵ But where a partner signs a bill or other instrument with his own name, he will not be personally responsible, if on the face of the note it appear that he signs for his copartners. Thus, where a partner signed a promissory note “for John Clarke, Richard Mitchell, Joseph Phillips, and Thomas Smith,” — Richard Mitchell; it was held that the firm was liable.⁶

¹ *Kirk v. Blurton*, 9 Mees. & Welsb. 289; *Faith v. Richmond*, 11 Adolph. & Ell. 339; *Story on Part.* § 102.

² *Mason v. Rumsey*, 1 Camp. N. P. 384; 3 Kent, Comm. Lect. 43, p. 41.

³ *Emly v. Lye*, 15 East, R. 7; *Siffkin v. Walker*, 2 Camp. R. 308; *Faith v. Richmond*, 11 Adolph. & Ell. 339; *Kirk v. Blurton*, 9 Mees. & Welsb. 284; *Pothier, De Sociétés*, N. 100, 101, 105.

⁴ *U. S. Bank v. Binney*, 5 Mason, R. 176, 183; *Bank of Rochester v. Monteath*, 1 Denio, R. 402.

⁵ *Etheridge v. Binney*, 9 Pick. R. 274.

⁶ *Ex parte Buckley*, 14 Mees. & Welsb. 472. In this case the contrary doctrine, as held in *Hall v. Smith*, 1 Barn. & Cres. 407, was expressly overruled. Baron Parke says: “This is, *primâ facie*, a promise by one partner, for himself and the other three partners, and it amounts to one promise of the four persons constituting the firm; and if Mitchell had authority, the firm is bound. I really must say I think *Hall v. Smith* cannot be supported. The partner, in

§ 219. To the general rule, that a partner may bind the firm in transactions within the scope of the business of the co-partnership, there are two exceptions. The first is, that one partner cannot, without the consent of his copartners, submit or refer any matter to arbitration, although it immediately refer to the business of the partnership.¹

§ 220. The other exception is, that one partner cannot execute a specialty so as to bind his copartners, unless authority be expressly given him under seal.² This doctrine is strictly declared in all the English decisions, with one exception, namely,—that where a specialty is signed and sealed by one

making the promise, is only an agent for the firm. Then does it bind him personally, or does it bind the firm? No doubt the instrument was intended to bind the firm; and as he had authority as a partner to do it, it had that effect. I think we must certify our opinion to the Lord Chancellor, that there was no separate right of action against Mitchell upon any of these notes." See also Story on Part. § 143, in which Mr. Justice Story, speaking of the case of *Hall v. Smith*, says: "This construction of the instrument certainly goes to the very verge of the law, and perhaps may be thought to deserve further consideration." See also *Bank of Rochester v. Monteath*, 1 Denio, R. 472.

¹ Com. Dig. Arbitrament, D. 2; 2 Bell, Comm. B. 7, p. 618, 5th ed.; Stead v. Salt, 3 Bing. 101; Adams v. Bankart, 1 Crompt. Mees. & Ros. 681; Karthaus v. Ferrer, 1 Peters, 222, 228; Strangford v. Green, 2 Mod. 228; Buchanan v. Curry, 19 Johns. 137; 3 Kent, Comm. Lect. 43, p. 49, 4th ed. In Pennsylvania and Kentucky, a different doctrine obtains, and one partner may, by an unsealed instrument, submit a matter to arbitration, so as to bind the partnership. Taylor v. Coryell, 12 Serg. & R. 243; Southard v. Steele, 3 Monroe, 435; Cotton v. Evans, 1 Dev. & Batt. 284. But see Gow on Part. ch. 2, § 2, p. 66; Gow's Supp. to Part. ch. 2, § 2, p. 17; Boyd v. Emmerson, 2 Ad. & Ell. 184; Harrison v. Jackson, 7 T. R. 207; Strangford v. Green, 2 Mod. 228; Story on Part. § 114, 115, 116.

² Ante, § 361; Watson on Part. ch. 4, p. 218 to 222, 2d ed.; Coll. on Part. B. 3, ch. 2, § 1, p. 308 to 312, 2d ed.; Gow on Part. ch. 2, § 2, p. 57 to 60; 3 Kent, Comm. Lect. 43, p. 47, 48, 49, 4th ed.; Story on Agency, § 49, 50, 51; Harrison v. Jackson, 7 T. R. 207; Metcalf v. Ryeroft, 6 M. & S. 75; Elliott v. Davis, 2 B. & P. 338; Hawkshaw v. Parkins, 2 Swanst. 543; Skinner v. Dayton, 19 Johns. 513.

partner in the presence, and with the consent of the others, they will be bound thereby, although the agent have only parol authority to execute it. Except in this one instance, therefore, the execution of a sealed instrument must be by authority, given under seal; and no previous parol assent, or subsequent parol ratification, is sufficient to render the partnership liable.¹

§ 221. In America, however, this exception is subject to many restrictions and modifications.² And the more equitable doctrine, declared in the courts of the United States, is, that a previous parol assent, or a subsequent parol ratification, whether express or implied, is sufficient to give validity to a deed signed by one partner in behalf of the partnership; although, unless such assent or ratification be given, a deed so signed would only be binding upon the particular partner.³ *A fortiori*, if one partner, in the presence of his copartners and without their objection, subscribe their names to a sealed instrument, it becomes the deed of all.⁴

§ 222. Another infringement is also made upon the English doctrine by act of Congress, which provides, that a custom-house bond given in the name of a firm and signed by one

¹ Gow on Part. ch. 2, § 2, p. 58 to 60, 3d ed.; *Steiglitz v. Egginton*, Holt, N. P. R. 141; *Harrison v. Jackson*, 7 T. R. 207; *Metcalf v. Rycroft*, 6 M. & S. 75; *Elliott v. Davis*, 2 B. & P. 338; *Hawkshaw v. Parkins*, 2 Swanst. 543.

² Act of Congress of March 1, 1823, ch. 149, § 25; *Laverty v. Burr*, 1 Wend. 529; *Bank of Rochester v. Bowen*, 7 Wend. 158; *N. Y. Fire Ins. Co. v. Bennett*, 5 Conn. 574.

³ *Harrison v. Sterry*, 5 Cranch, 289. See *Cady v. Shepherd*, 11 Pick. 400, in which all the authorities are reviewed and the doctrine elaborately discussed. *Skinner v. Dayton*, 19 Johns. 513; *Gram v. Seton*, 1 Hall, 262, in which all the authorities are examined and discussed. *Anderson v. Tompkins*, 1 Brock. Circ. R. 462; *Lee v. Onstott*, 1 Pike, R. 206; *Morse v. Bellows*, 7 N. Hamp. R. 549; *Henderson v. Barbee*, 6 Blackf. R. 26.

⁴ *Henderson v. Barbee*, 6 Blackf. R. 26; *Pike v. Bacon*, 8 Shepley, R. 280.

partner, for the payment of duties upon goods imported for and belonging to the partnership, is binding upon the firm.¹

§ 223. Where the several partners disagree in regard to the propriety of a particular partnership transaction, the decision is with the majority in number, although the interest or shares of each be different; provided such rule be consistent with the articles of copartnership. The minority are, however, entitled to notice, and are to be consulted. The articles of a copartnership cannot, however, be altered, except by the unanimous consent of all.² If there be a balance of opinion, no action can be made by either party, in respect to the matter of difference; and if, therefore, such disagreement be in respect to the essential objects and purposes of the partnership, it amounts to a suspension thereof, as to all persons having notice of the disagreement.³

§ 224. The general doctrine, that the partnership is liable for all transactions by one partner, acting as agent, within the scope of the partnership business, is not limited to cases where such partner acts *bonâ fide*; but extends to all acknowledgments, admissions, frauds, or misrepresentations by one partner, made *malâ fide*, in relation to matters apparently

¹ Act of Congress of March 18, 1823, ch. 149, § 25.

² *Const v. Harris*, Turn. & Russ. 496; *Story on Part.* § 123; *Lloyd v. Loaring*, 6 Ves. Jr. 773; *Davies v. Hawkins*, 3 M. & Selw. 488; *Kirk v. Hodgson*, 3 Johns. Ch. R. 400, 405; *Watson on Part.* ch. 4, p. 194, 2d ed.; *Minnit v. Whinary*, 3 Bro. Parl. Rep. 523; 5 Bro. Parl. Cas. by Tomlins, 489; *Green v. Miller*, 6 Johns. 39; 5 Co. 63, a; *Coll. on Part. B.* 3, ch. 1, p. 261, 2d ed.; *Grindley v. Barker*, 1 B. & P. 229; *Vice v. Fleming*, 1 Younge & Jerv. 227, 230; *Rooth v. Janney*, 7 Price, 193; *Willis v. Dyson*, 1 Stark. 164; *Attorney-General v. Davy*, 2 Atk. 212; *The King v. Beeston*, 3 T. R. 592; *Lord Galway v. Matthew*, 1 Camp. 403; s. c. 10 East, 264; 3 Kent, Comm. Lect. 43, p. 45, 4th ed.; *Gow on Part.* ch. 2, § 2, p. 52, 3d ed. and note; *Livingston v. Lynch*, 4 Johns. Ch. R. 573, 597; *Withnell v. Gartham*, 6 T. R. 388.

³ *Willis v. Dyson*, 1 Stark. R. 164; *Story on Part.* § 123.

within the scope of his authority.¹ This doctrine is founded not only upon reasons of public policy, but also upon the ground, that there is an implied undertaking, on the part of each partner, to be responsible for the honesty of all, and wherever an injury must result to one of two innocent persons, it should be borne by the party, whose act is the cause of the injury. If credit, therefore, be given *bonâ fide* to the firm, on account of the misrepresentation or concealment of one partner, all the partners will be responsible, notwithstanding their ignorance thereof, and notwithstanding any private agreement between them, limiting their liability.² But if the party with whom the partner deals have knowledge or notice, that he is acting *malâ fide*, or beyond his authority, and especially if there be collusion between them, the firm will not be bound by any act done, or contract made by them.³ In cases of fraud by one partner, the limitation in bar of the

¹ U. S. Bank v. Binney, 5 Mason, 176, 187, 188; Etheredge v. Binney, 9 Pick. 272; Winship v. Bank of U. S. 5 Peters, 529; Story on Part. § 105; Coll. on Part. B. 3, ch. 1, p. 260; Thicknesse v. Bromilow, 2 Crompt. & Jerv. 428; Clavering v. Westley, 3 P. W. 402; Baker v. Charlton, 1 Peake, 80; 1 Montague on Part. p. 37, note c.; Swan v. Steele, 7 East, 210; Ex parte Bolitho, 1 Buck's Bank, R. 100; So. Car. Bank v. Case, 8 B. & C. 427; Manuf. & Mech. Bank v. Winship, 5 Pick. 11; Mifflin v. Smith, 17 Serg. & Rawle, 165; 2 Bell, Comm. B. 7, § 615, 618, 5th ed.; Onondaga Bank v. De Puy, 17 Wend. R. 47; Locke v. Stearns, 1 Metcalf, R. 560.

² Gow on Part. ch. 2, § 2, p. 55, 3d ed.; Coll. on Part. B. 3, ch. 1, § 4, p. 282 to 290, 2d ed.; Lacy v. McNeile, 4 Dowl. & Ry. 7; Pittam v. Foster, 1 B. & C. 248; Burleigh v. Stott, 8 B. & C. 36; Helsby v. Mears, 5 B. & C. 504; Bignold v. Waterhouse, 1 M. & S. 255; Story on Part. § 107, 108; Willett v. Chambers, Cowp. 814; Stone v. Marsh, 1 Ry. & Mood. 364; 6 B. & C. 561; Hume v. Bolland, 1 Ry. & Mood. 371; Marsh v. Keating, 2 Clarke & Finn. 250; Boardman v. Gore, 15 Mass. 331; Rapp v. Latham, 2 B. & Ald. 795.

³ Snaith v. Burridge, 4 Taunt. 684; Rogers v. Batchelor, 12 Peters, 221; Story on Part. 110; Coll. on Part. B. 3, ch. 1, p. 259 to 282, 2d ed.; Green v. Deakin, 2 Stark. 347; Hope v. Cust, 1 East, 53; Story on Agency, § 125; Ex parte Agace, 2 Cox, 312; Watson on Part. ch 4, p. 180, 2d ed.; Farrar v. Hutchinson, 9 Ad. & Ell. 641; Arden v. Sharpe, 2 Esp. 524; Ex parte Goulding, 2 Glyn & Jam. 118.

claim in equity only begins to run upon the discovery of the fraud by the party defrauded.¹

§ 224 *a*. The application of a joint security by a partner in discharge of his individual debt, although it does not of itself give rise to an imperative presumption of *mala fides*, yet throws upon the creditor the burden of proof, not only that the whole transaction has been in entire good faith on his part,² but without negligence; for as such a use of the partnership funds is a misappropriation, the mere nature of the transaction is enough to put him on his guard, and he is bound to acquaint himself with the actual authority of the partner.³ But where the negotiable paper of a firm, although given by a partner in payment of his private debt, passes into the hands of a *bonâ fide* holder, for valuable consideration, without actual or constructive notice, the partnership would be liable.⁴

§ 225. The release of a partnership debt by one partner, will be void as to the firm, if it be taken in discharge of the separate debt of the partner releasing it, by a creditor, who has knowledge of all the circumstances. In such cases the burden of proof is on the holder or creditor to repel the presumption of fraud or collusion, unless there were circumstances, from which the assent of the partners might be inferred;

¹ Blair *v.* Bromley, 5 Hare, R. 542.

² Frankland *v.* McGusty, 1 Knapp, P. C. R. 274; Ex parte Bonbonus, 8 Ves. Jr. R. 540; Lloyd *v.* Freshfield, 9 Dowl. & Ryl. 19; Gansevoort *v.* Williams, 14 Wend. R. 133; Dob *v.* Halsey, 16 Johns. R. 34.

³ Rogers *v.* Batchelor, 12 Peters, R. 229.

⁴ Ibid.; Ridley *v.* Taylor, 13 East, R. 175; Williams *v.* Thomas, 6 Esp. R. 18; Livingston *v.* Roosevelt, 4 Johns. R. 251; 3 Kent, Comm. Lect. 43, p. 44; N. Y. Fire Ins. Co. 1 Bennett, 5 Conn. R. 574; Austin *v.* Vandermark, 4 Hill, R. 259; Wells *v.* Evans, 20 Wend. R. 251; s. c. 22 Wend. R. 324; Waldo Bank *v.* Lumbert, 4 Shep. R. 416.

because the nature of such a transaction should have put the creditor on his guard.¹

§ 226. If, however, credit be exclusively given to a particular partner, in any contract, he only will be bound; and the same rule applies, as that which obtains in contracts of agents. Such credit must, however, be exclusive; and in order to be deemed exclusive, must be given with full knowledge of all the parties interested. The rule applicable in cases of mere agency, does not apply to the case of credit given to an ostensible partner, where there are unknown dormant partners; because the creditor is in such case deprived of the right of choosing his debtor. So, also, the rule does not apply to the case of a partnership carried on in the sole name of one partner, who at the same time transacts business on his own separate account, provided the contract be made in behalf of the partnership.² But where a note is signed by a partner in his individual name, and not in the name of the firm, the firm is not responsible therefor, unless they had treated the note as their own.³

¹ *Gram v. Cadwell*, 5 Cow. 489; *Evernglim v. Ensworth*, 7 Wend. 326; *Shirreff v. Wilkies*, 1 East, 48; *Story on Part.* § 133, 134, 135; *Farrar v. Hutchinson*, 9 Ad. & El. 641; *Ex parte Bonbonus*, 8 Ves. Jr. 540; *Gow on Part. ch. 4*, § 1, p. 149, 3d ed.; *Coll. on Part. B. 3*, ch. 2, p. 331 to 347, (3d ed.); *Frankland v. McGusty*, 1 Knapp, P. C. R. 272; *Lloyd v. Freshfield*, 2 Car. & P. 325; *Foot v. Sabin*, 19 Johns. 154; *Dob v. Halsey*, 16 Johns. 34; *Gansevoort v. Williams*, 14 Wend. 133; *Rogers v. Batchelor*, 12 Peters, 229.

² *Gow on Part. ch. 4*, § 1, p. 162; *Story on Agency*, § 291, 292. See ante, *Agency*, and cases cited. *Hoare v. Dawes*, Doug. 371; *Story on Part.* § 138, 139; 2 Kent, Comm. Lect. 41, p. 630, 631, 4th ed.; *Paley on Agency*, by Lloyd; *Thompson v. Davenport*, 9 B. & C. 78; *U. S. Bank v. Binney*, 5 Mason, 176; *Winship v. Bank of U. S.* 5 Peters, 529; *Kelley v. Hurlburt*, 5 Cow. 534; *Mifflin v. Smith*, 17 Serg. & R. 25. This principle only applies to commercial partnerships, however. *Pitts v. Waugh*, 4 Mass. 424; *Smith v. Burnham*, 3 Sumner, 435; *Saville v. Robertson*, 4 T. R. 725; *Robinson v. Wilkinson*, 3 Price, 538; *Milledge v. Boston Iron Co.* 5 Cushing, R. 158; *Post*, § 279.

³ *Emly v. Lye*, 15 East, 7; *Siffkin v. Walker*, 2 Camp. 308. See ante § 218.

§ 277. An incoming partner will not be liable in respect to debts contracted by the firm previously to his becoming a member, unless he expressly or impliedly assume such responsibility. The presumption of law is against his liability, but it may be repelled by proof.¹

§ 228. A retiring partner will, however, be responsible to creditors of the firm for debts contracted while he was a member, notwithstanding any private agreement between the partners relative to his responsibility, unless the creditors assent to such arrangement and agree to consider the remaining partners as their exclusive debtors.² So, also, if an ostensible partner retire from a firm, he will be responsible for all debts and liabilities of the firm contracted subsequently to his retirement, with persons having no knowledge thereof, who have previously dealt with the firm. For the fact of his being a partner may be the only ground upon which credit was given to the firm; and every one who deals with the firm, without notice of such fact, is entitled to give credit to all of the members. But if such person be a dormant partner, he will not be liable for any debts contracted after he retires from the firm; because credit cannot be supposed to have been given to him, he never having been held out as a partner. An ostensible part-

¹ Coll. on Part. B. 3, ch. 3, § 2, p. 361, (2d ed.); Story on Part. § 152; Shirreff v. Wilks, 1 East, 48; Williams v. Jones, 5 B. & C. 108; Vere v. Ashby, 10 B. & C. 289; Catt v. Howard, 3 Stark. 5; Ex parte Jackson, 1 Ves. Jr. 131; Kirwan v. Kirwan, 2 Cromp. and Mees. 617; Hilsby v. Mears, 5 B. & C. 584; Ex parte Peele, 6 Ves. Jr. 602; Hoby v. Roebuck, 7 Taunt. 157; Ketchum v. Durkee, 1 Hoff, 538.

² Coll. on Part. B. 3, ch. 3, § 3, p. 383 to 398, (2d ed.); Evans v. Drummond, 4 Esp. 89; Reed v. White, 5 Esp. 122; Thompson v. Percival, 5 B. & Ad. 925; Oakeley v. Pasheller, 10 Bligh, 548; s. c. 4 Clarke & Finn. 207; Gough v. Davies, 4 Price, 200; Harris v. Lindsay, 4 Wash. Cir. R. 271; Hart v. Alexander, 2 Mees. & Welsb. 484; Daniel v. Cross, 3 Ves. Jr. 277; Bedford v. Deakin, 2 B. & Ald. 210; Featherstone v. Hunt, 1 B. & C. 113; Blew v. Wyatt, 5 Car. & P. 397; Smith v. Rogers, 17 Johns. 340; Story on Part. 158, 159.

ner is, therefore, bound to give notice of his retirement to all creditors with whom he has previously dealt, in order to limit his responsibility in future transactions; and if loss accrue in consequence of his omission so to do, he must suffer the consequences of his own negligence.¹ But no notice of retirement need be given, by either an ostensible or a dormant partner, to persons with whom the firm has had no previous dealings, unless such partner allow his name to be used, as if he were one of the firm; in which case he will be responsible to any one who is thereby deceived.²

§ 229. Notice may be either express or implied. To all persons, who have been accustomed to deal with the firm previously, express notice should be given. Knowledge of the fact, however it be obtained, is sufficient notice, however; and if the circumstances, under which such person deals with a firm subsequently to the retirement of one partner, be such as to raise the presumption of his knowledge of the fact, notice will be inferred, and he must prove his ignorance, to entitle himself to recover against the retired partner. The question of notice is, ordinarily, a matter compounded of law and fact, which must depend upon the circumstances of each particular case, and is for the determination of a jury. Notice in any public gazette in the place where the partnership exists, is sufficient notice to all persons, who have not previously dealt with the firm, whether it be seen by them or not; and such notice is sufficient to create a presumption of knowledge on

¹ Collyer on Part. B. 3, ch. 3, § 3, p. 369 to 375, (2d ed.); 3 Kent, Comm. Lect. 43, p. 66, 67, 68, (4th ed.); Gow on Part. ch. 5, § 2, p. 248 to 251; Story on Part. § 160, 161; *Graham v. Hope*, Peake, R. 154; *Gorham v. Thompson*, Peake, R. 42; *Watson* on Part. ch. 7, p. 384, 385.

² *Parkin v. Carruthers*, 3 Esp. 248; 3 Kent, Comm. Lect. 43, p. 67, 68; *Williams v. Keats*, 2 Stark. 290; *Brown v. Leonard*, 2 Chitty, R. 120; *Newsome v. Coles*, 2 Camp. 617; *Dolman v. Orchard*, 2 Car. & P. 104; *Tombeckbee Bank v. Dumell*, 5 Mason, 56; *Lansing v. Gaine*, 2 Johns. 300; *Ketcham v. Clark*, 6 Johns. 144, 148; *Carter v. Whalley*, 1 B. & Ad. 11; *Le Roy v. Johnson*, 2 Peters, 198, 200.

the part of every one, unless the retiring party, by some act or omission, actually or apparently continue his liability.¹ The same rule, in regard to notice, also obtains in case of a dissolution of the partnership by the act of the partners.²

§ 230. If a retiring partner fraudulently withdraw a portion of the partnership funds, when the partnership is insolvent, he will be responsible, whether notice of his retirement be given or not. It is, however, on account of the *fraud*, that he is held liable, and unless it exist, he will not be responsible.³

§ 231. With regard to torts, committed by partners, the same rules apply as those which obtain in cases of agency. The tort of one partner will not bind the partnership, unless authorized or adopted by the firm, or within the scope of the business. If it be assented to, or adopted, or if it be committed in the ordinary course of business, although without the knowledge of the other partners, all the partners are liable, and may be sued jointly or severally.⁴

¹ Story on Part. § 160, 161, 162; 3 Kent, Comm. Lect. 43, p. 67, 68; Coll. on Part. B. 3, ch. 3, p. 368 to 371, (2d ed.); Gow on Part. ch. 5, § 2, p. 248 to 251, (3d ed.); Watson on Part. ch. 7, p. 384, 385, (2d ed.); 2 Bell, Comm. B. 7, p. 640 to 643, (5th ed.); Parkin v. Carruthers, 3 Esp. 248; Carter v. Whalley, 1 Barn. & Adolph. 11; Newsome v. Coles, 2 Camp. R. 617; Godfrey v. Turnbull, 1 Esp. 371.

² Story on Part. § 128, 129, 162; Gow on Part. ch. 5, § 2, p. 248 to 251, (3d ed.); Coll. on Part. B. 3, ch. 3, § 3, p. 368 to 375, (2d ed.).

³ Anderson v. Maltby, 2 Ves. Jr. 244; s. c. 4 Bro. Ch. R. 423; Coll. on Part. B. 3, ch. 3, § 3, p. 400 to 404, (2d ed.); Parker v. Ramsbottom, 3 B. & C. 257; Ex parte Peake, 1 Mad. 346; Gow on Part. ch. 5, § 2, p. 237, 238, (3d ed.); Story on Part. § 163.

⁴ Gow on Part. ch. 4, § 1, p. 160, (3d ed.); Mitchell v. Tarbutt, 5 T. R. 649; Morley v. Gaisford, 2 H. B. 442; Moreton v. Hardern, 4 B. & C. 223; Story on Part. § 166, 167; Edmondson v. Davis, 4 Esp. 14; Attorn. Genl. v. Burges, Bunb. 223; Rex v. Topham, 4 T. R. 126; Rex v. Marsh, 2 B. & C. 723; Rex v. Stranyfworth, Bunb. 97; Rapp v. Latham, 2 B. & Ald. 795; Stone v. Marsh, 6 B. & C. 551; Kilby v. Wilson, Ry. & Mood. 179; Babcock v. Stone, 3 McLean, 172; Nisbet v. Patton, 4 Rawle, 120.

RIGHTS AND LIABILITIES OF PARTNERS TO EACH OTHER.

§ 232. We have already considered the rights growing out of the relation of partners to third persons; and we now shall consider the *Rights and Liabilities of Partners* to each other. Every partner is liable to the partnership for losses and injuries resulting from his gross negligence, unskilfulness, or misconduct; and the measure of skill and diligence required of him is the same as that required of an agent for hire, namely, reasonable diligence and ordinary skill.¹ A partner is bound, however, to exercise his best discretion, and to observe a perfect good faith in all his transactions, or he will be responsible to his copartners.² So, also, he must not violate the articles of partnership; nor transact any business on his own account, incompatible with the interest of the partnership;³ nor exceed his power and authority; for in such case, if loss result, he will be personally responsible therefor.⁴ Besides this, he is bound to keep strict accounts of his individual transactions in behalf of the partnership, and also of his receipts, and to keep them open for inspection.⁵

§ 232 *a*. In case one of the partners have advanced capital

¹ Story on Part. § 169; Story on Agency, § 183; Ante, Agency.

² Russell v. Austwick, 1 Sim. R. 52; 3 Kent, Comm. Lect. 43, p. 51, (4th ed.); Story on Part. § 174; Carter v. Horne, 1 Eq. Cas. Abridg. Account A. pl. 13; Fawcett v. Whitehouse, 1 Russ. & Mylne, 132, 148; Hichens v. Congreve, 4 Russ. 562; Featherstonehaugh v. Fenwick, 17 Ves. 298; Dougherty v. Van Nostrand, 1 Hoff. 68, 69, 70; Burton v. Wookey, 6 Madd. & Geldart, 367; Crawshaw v. Collins, 15 Ves. 218, 227; Jeffreys v. Smith, 3 Russ. 158.

³ Burton v. Wookey, 6 Madd. 367; Story on Part. § 177; 3 Kent, Comm. Lect. 43, p. 51, (4th ed.); Long v. Majestre, 1 Johns. Ch. 305; Glassington v. Thwaites, 1 Sim. & Stu. 124.

⁴ Coll. on Part. B. 2, ch. 2, § 2, p. 131 to 161, (2d ed.); Stoughton v. Lynch, 1 Johns. Ch. R. 467.

⁵ Coll. on Part. B. 2, ch. 2, § 1, p. 121; Rowe v. Wood, 2 Jac. & Walk. 553, 558; Ex parte Yonge, 3 Ves. & B. 36; Goodman v. Whitcomb, 1 Jac. & Walk. 589; Story on Part. § 181.

to the concern, interest will be allowed where there is an agreement or understanding to that effect,¹ but whether, in the absence of any evidence of such an understanding, interest will be allowed is not clearly settled. It has been held in America, that neither partner, in such case, will be entitled to interest on advances before a general settlement or dissolution,² but a contrary opinion has been intimated in a late case by an eminent English judge.³

§ 233. The articles of partnership are to be strictly adhered to, and are to be construed according to the general rules of interpretation, applicable to contracts in general, and stated in a subsequent part of this treatise.⁴ They are also liable to be controlled in equity by the acts of the partnership; and such as have not been acted upon, are treated as if they had never existed.⁵ The partnership commences from the date and execution of the articles, unless some other time is therein specified; and this rule cannot be varied by parol evidence of a contrary intention.⁶ It exists, unless limited, or dissolved by agreement, until the death of one of the partners. This brings us to the consideration of the mode in which a partnership may be dissolved.

¹ *Hodges v. Parker*, 17 Verm. R. 242; *Winsor v. Savage*, 9 Metcalf, R. 346; *Millaudon v. Sylvestre*, 8 Curry, (Louis.) 262.

² *Lee v. Lashbrook*, 8 Dana, R. 214; *Jones v. Jones*, 1 Iredell, Eq. R. 332; *Honore v. Colmesnil*, 7 Dana, R. 199; *Waggoner v. Gray*, 2 H. & Munf. 603; *Dexter v. Arnold*, 3 Mason, R. 284.

³ *Millar v. Craig*, 6 Beavan, R. 433. See also, as to this point, *Hodges v. Parker*, 17 Verm. R. 242; *Stoughton v. Lynch*, 1 Johns. Ch. R. 467; *Beacham v. Eckford*, 2 Sandf. Ch. R. 116.

⁴ Story on Part. § 190; Gow on Part. ch. 2, § 4, p. 109, (3d ed.). See post.

⁵ *Jackson v. Sedgwick*, 1 Swanst. 460, 469; Story on Part. § 192.

⁶ *Featherstonehaugh v. Fenwick*, 17 Ves. 299; *Booth v. Parks*, 1 Molloy, 466; *Crawshay v. Collins*, 15 Ves. 218; *U. S. Bank v. Binney*, 5 Mason, 176.

DISSOLUTION OF PARTNERSHIP.

§ 234. We come, therefore, next to the consideration of what constitutes a *Dissolution of Partnership*. A partnership may be dissolved in six ways; 1st. By the death, or incapacity, or bankruptcy, of the parties, or of either party; 2d. By the consent and agreement of the parties, or some of them; 3d. By the expiration of the time limited in the articles of copartnership for its duration; 4th. By the decree of a court of equity; 5th. By the extinction of the subject-matter of the partnership, or the completion of the business; 6th. By a war between the countries of which the partners are respectively subjects.

§ 235. A partnership will be entirely dissolved by the death of one of the partners, however numerous the partners may be; upon the ground, that the personal qualifications and skill of each party constitute the consideration of the contract. The dissolution takes effect from the time when the surviving partners receive notice of the death of one of the members.¹ So, also, if either party become incapacitated to act, the partnership is dissolved; whether such incapacity be created by law, or exist in fact; as if a person become palsied or idiotic; or if he lose his capacity by reason of outlawry, or attainder of felony, or treason; or by subsequent marriage, if the partner be a *feme sole*; or if war be declared between the countries, of which the partners are subjects respectively.² So, also,

¹ Story on Part. § 317, 318, 319; *Nerot v. Burnand*, 4 Russ. 250; 3 Kent, Comm. Lect. 43, p. 56; *Crawshay v. Collins*, 15 Ves. 218; *Gow on Part. ch. 5*, § 1, p. 219, 220; *Vulliamy v. Noble*, 3 Meriv. 614; *Gillespie v. Hamilton*, 3 Madd. 251; *Scholefield v. Eichelberger*, 7 Pet. 586; *Burwell v. Mandeville*, 2 How. 560; *Knapp v. McBride*, 7 Ala. 19.

² *Griswold v. Waddington*, 16 Johns. 438; Story on Part. § 303, 304, 315; *Coll. on Part. B. 1*, ch. 2, § 2, p. 71; *Watson on Part. ch. 5*, § 1, p. 216, 217, (3d ed.); *Nerot v. Burnand*, 4 Rus. 247; *Potts v. Bell*, 8 T. R. 561; *The Rapid*, 8 Cranch, 155, 161; *The Hoop*, 1 Robin. 196; *The Julia*, 8 Cranch, 181.

the absolute absconding of one partner would operate to dissolve a partnership, although a mere voluntary and temporary absence would not.¹ Where one of the partners sells his share to a stranger, or to one of the firm, the change of parties would also dissolve the partnership,² unless there be a special provision for such a circumstance in the articles of copartnership. Again, the bankruptcy or insolvency of either the whole firm, or of an individual member; or a voluntary and *bonâ fide* assignment by one of the partners of all his interest in the stock, operates as a dissolution of the partnership, and the assignee or purchaser becomes tenant in common with the other partners.³ This rule is founded upon the fact, that a continuation of the partnership is at variance with the regulation of the bankrupt law, the whole of the bankrupt's property being vested in the assignee. The dissolution takes effect from the decree of bankruptcy under the commission, and reverts to the time when the act of bankruptcy was committed.⁴ From the time, therefore, of the act of bankruptcy, all the acts of the bankrupt partner are void, and the solvent partners cannot carry on the partnership business.⁵

¹ *Whitman v. Leonard*, 3 Pick. R. 179; *Arnold v. Brown*, 24 Pick. R. 94.

² *Cochran v. Perry*, 8 Watts & Serg. 262.

³ *Marquand v. Pres. and Dir. of N. Y. Manuf. Co.* 17 Johns. 525; *Ketcham v. Clark*, 6 Johns. 148; 3 Kent, Comm. Lect. 43, p. 59, (4th ed.); *Rodriguez v. Heffernan*, 5 Johns. Ch. R. 417; *Nicoll v. Mumford*, 4 Johns. Ch. R. 522, 525; *Ex parte Barrow*, 2 Rose, 252; *Murray v. Bogert*, 14 Johns. 318; *Kingman v. Spurr*, 7 Pick. 235; *Heath v. Sansom*, 4 B. & Ad. 175; *Tapley v. Butterfield*, 1 Metcalf, 515; *Havens v. Hussey*, 5 Paige, 30, 31; *Hitchcock v. St. John*, 1 Hoff. 511; *Anderson v. Tompkins*, 1 Brock. 456; *Pearpoint v. Graham*, 4 Wash. Circ. R. 232; *Story on Part.* 307, 308, 309; *Arnold v. Brown*, 24 Pick. R. 94.

⁴ *Story on Part.* 314; *Watson on Part.* ch. 5, p. 302 to 313, (2d ed.); *Gow on Part.* ch. 5, § 3, p. 298; *Coll. on Part.* B. 4, ch. 1, p. 583 to 590; *Fox v. Hanbury*, Cowp. 445; *Hague v. Rolleston*, 4 Burr. 2174; *Ex parte Smith*, 5 Ves. 295; *Harvey v. Crickett*, 5 M. & S. 336; *Dutton v. Morrison*, 17 Ves. 194; *Barker v. Goodair*, 11 Ves. 78; *Thomason v. Frere*, 10 East, 418.

⁵ *Barker v. Goodair*, 11 Ves. 78; *Dutton v. Morrison*, 17 Ves. 193; *In re Wait*, 1 Jac. & Walk. 605; *Story on Part.* § 340, 341.

§ 233. In case of bankruptcy, the assets are to be distributed as follows: first, the joint debts are to be paid out of the joint property; second, the private debts are to be paid out of the private property; and if in either case, there be a surplus, it goes to satisfy the other class of debts, but not otherwise. If the partnership creditors cannot be satisfied out of the partnership property, they cannot resort to the private property of each partner, until his private creditors are paid out of that sum; upon the ground, that the funds are to be liable, where the credit was given; and this is the test of the fund to be applied to each debt.¹ There are, however, three exceptions to this rule, by which all the creditors share equally. 1st. Where the joint creditor is the petitioner for a separate commission against the bankrupt partner; 2d. Where there is no joint estate; or no living solvent partner; 3d. Where there are no separate debts.² But where persons are joint and several creditors of the partners, they are entitled to prove against either estate, but not against both. When they have made their election, they are excluded from a dividend of the other funds, unless there remain a surplus; or unless upon equitable circumstances, when it will not interfere with the rights of others, already acquired.³ So, also, in the case of involuntary assign-

Gow on Part. ch. 5, § 3, p. 235, 236, (3d ed.); Ibid. p. 281, 282, 299, 300; Coll. on Part. B. 4, ch. 2, § 3, p. 623; *Twiss v. Massey*, 1 Atk. 67; Ex parte Cooke, 2 P. W. 500; Ex parte Elton, 3 Ves. 240; Ex parte Abell, 4 Ves. 837; Ex parte Clay, 6 Ves. 813; *Bolton v. Puller*, 1 B. & P. 539; Story on Part. § 376; Watson on Part. ch. 5, p. 262, 263, 324 to 334.

² Ex parte Tate, Co. Bank. Law, 250; Coll. on Part. B. 4, ch. 2, § 2, p. 623; *Twiss v. Massey*, 1 Atk. 67; Ex parte Crisp, 1 Atk. 133; Ex parte Elton, 3 Ves. 238; Ex parte Hodgson, 2 Bro. Ch. 5; *Dutton v. Morrison*, 17 Ves. 207; Story on Part. 379, and note (1), § 380, 381; Ex parte Leaf, 1 Deacon, C. L. 429; *In re Lee v. Armstrong*, 2 Rose, 54, note; Ex parte Hill, 5 B. & P. 191, *a.*; Ex parte Janson, 3 Madd. 229; Ex parte Kensington, 14 Ves. 447; Ex parte Chandler, 9 Ves. 35; Ex parte Taitt, 16 Ves. 193; Ex parte Hubbard, 13 Ves. 424.

³ Gow on Part. ch. 5, § 3, p. 286, 287; Story on Part. § 384; *Cooke's Bankrupt Law*, 259; Ex parte Banks, 1 Atk. 106; Ex parte Rowlandson, 3 P. W. 405; Ex parte Bond, 1 Atk. 98; Coll. on Part. B. 4, ch. 2, § 8, p. 651.

ment, under judicial process, where a separate creditor of the partner levies an execution on the partnership goods and sells them, the partnership is dissolved *pro tanto*, to the extent of the right, title, and interest levied upon, and sold.¹

§ 237. Secondly. If there be no definite time agreed upon limiting the duration of the partnership, it may be dissolved at any moment by one partner; for, in such case, it can only exist by the consent of all the parties. But if the partnership be formed for a definite time, it can only be dissolved, within that time, by the mutual agreement of all the parties.²

§ 238. Thirdly. If a time be fixed for the duration of the partnership, upon the expiration of such time, it is dissolved. But if, at the expiration of the time, the partnership should still be continued, it will be considered as a mere partnership at will, and dissoluble at the instance of either party.³

§ 239. Fourthly. A partnership may be dissolved by a decree of a court of equity; or it may be declared void *ab initio*. It may be dissolved on account of wilful fraud, misconduct, or even gross negligence on the part of any partner, whenever it

¹ *Moody v. Payne*, 2 Johns. Ch. 548; *Dutton v. Morrison*, 17 Ves. 194; *Allen v. Wells*, 22 Pick. 450; Story on Part. § 261, § 263, § 311; *Skipp v. Harwood*, 2 Swanst. 585, 586, note; *Nicoll v. Munford*, 4 Johns. Ch. 525; *Rodrigues v. Heffernan*, 5 Johns. Ch. R. 417, 428.

² *Pearpoint v. Graham*, 4 Wash. Circ. C. R. 234; *Peacock v. Peacock*, 16 Ves. 56; *Miles v. Thomas*, 9 Sim. 606; 1 Story on Eq. Jurisp. § 668; *Bishop v. Breckles*, 1 Hoff. 534; 3 Kent, Comm. Lect. 43, p. 53; *Griswold v. Waddington*, 15 Johns. R. 57; *Heath v. Sansom*, 4 B. & Ald. 172; Story on Part. § 268, 269, 275, and note 3; *Pothier*, Pand. Lib. 17, tit. 2, n. 64; *Doe v. Miles*, 1 Stark. 181; 1 Montague on Part. Pt. 3, ch. 1, § 1, p. 90, (113); *Sanderson v. Milton Stage Co.* 18 Verm. R. 107.

³ *Williams v. Jones*, 5 B. & C. 108; *Crawford v. Hamilton*, 3 Madd. 254; *Scholefield v. Eichelberger*, 7 Peters, 594; *Vulliamy v. Noble*, 3 Meriv. 614; *Gratz v. Bayard*, 11 Serg. & R. 41; Coll. on Part. B. 1, ch. 2, § 2, p. 73, 74; *Gow* on Part. ch. 5, § 1, p. 219, 220, 3d ed.; Story on Part. § 275, and note 3.

is productive of injury to the partnership. Such misconduct must not, however, be trivial, or the court will only enjoin his duty upon the faulty partner. So, also, a dissolution will be granted where the undertaking of the partnership is impracticable, or where some one of the partners is disabled from contributing his skill and labor, when such disability obviously obstructs the interests of the partnership; as if the person become so insane as to be disqualified from performing the duties of the partnership.¹ Insanity does not, however, *per se*, work a dissolution of the partnership, but only gives to the other parties the right of election, whether to continue it or not.² And generally, indeed, where any thing occurs to obstruct or prejudice the interests of the partnership, it will afford a reasonable ground for a decree of dissolution.

§ 240. Lastly, a partnership may be dissolved by the completion of the whole business, for which it was formed;³ or by the destruction of the subject-matter of the partnership, — as if the partnership be in reference to a ship to be employed by them, and the ship be burnt or totally lost.

§ 240 *a*. Where a dissolution results from the retirement of

¹ Wrexham v. Huddleston, cited in 1 Swanst. 514, note; Sayer v. Bennet, 1 Cox's Cas. 107; Waters v. Taylor, 2 Ves. & Bea. 301; Jones v. Noy, 2 Mylne & Keen, 125; Milne v. Bartlett, Atk. & Wy. April, 1839; Wray v. Hutchinson, 2 Myl. & Keen, 235; 1 Story on Eq. Jurisp. § 673; Goodman v. Whitcomb, 1 Jac. & Walk. 589; Chapman v. Beach, 1 Jac. & Walk. 594; Loscombe v. Russell, 4 Sim. R. 8; 3 Kent, Comm. Lect. 43, p. 58, 60; Gratz v. Bayard, 11 Serg. & R. 41; 1 Montague on Part. p. 3, ch. 1, p. 113; Gow on Part. ch. 3, § 1, p. 221, 3d ed.; Littlewood v. Caldwell, 11 Price, 97; Story on Part. § 282-300; Gow on Part. ch. 5, § 1, p. 227, 3d ed.; Pearce v. Piper, 17 Ves. 1; Beaumont v. Meredith, 3 Ves. & Bea. 180, 181; Reeve v. Parkins, 2 Jac. & Walk. 390.

² Story on Part. § 294; Pothier, de Société, n. 141, 142, 148, 152; Coll. on Part. B. 2, ch. 3, § 3, p. 195.

³ Story on Part. § 280, 281; Kent, Comm. Lect. 43, p. 53; Griswold v. Waddington, 16 Johns. 438.

one or more of the partners, or from the act of the parties, it becomes necessary for notice thereof to be given, to absolve the withdrawing members from responsibility to third persons; for a partnership is, as to such persons, considered as continuing, until they are actually aware of its dissolution, or have had notice thereof. When, therefore, the dissolution results from the retirement of a *known partner* or from a change of known parties, the retiring partner will still continue to be liable, unless notice of his retirement be given.¹ This rule stands upon the ground that persons dealing with a firm give credit to all the known parties, and the withdrawal of one may affect his confidence in the firm, and consequently all his dealings with it. Where, however, the reason fails the rule fails, and as no credit can be given to an unknown or dormant partner, notice of his withdrawal is not necessary, except to those who know of his connection with the firm.²

§ 240*b*. Where a known or ostensible partner retires from the firm, actual notice of his withdrawal must be given to all who have had *previous* dealings with the firm; and a public notice not brought home to their knowledge will not be sufficient.³ Of course, if knowledge on their part be proved, notice is unnecessary.⁴ But in respect to persons who have not had previous dealings with the firm, public notice printed in a regular newspaper of the city where the partnership

¹ 3 Kent, Comm. Lect. 43, p. 67, 68; Story on Part. § 160, 161; Gorham v. Thompson, Peake, R. 42; Watkinson v. Bank of Penn. 4 Whart. R. 482; Pitcher v. Barrows, 17 Pick. R. 361.

² Ibid. Evans v. Drummond, 4 Esp. R. 89; Newmarch v. Clay, 14 East, R. 239; Farrar v. Deflinne, 1 Car. & Kirw. 580; Magill v. Merrie, 5 B. Munroe, 168.

³ Watkinson v. Bank of Penn. 4 Whart. R. 482; Pitcher v. Barrows, 17 Pick. R. 361; Gorham v. Thompson, Peake, R. 42; Wardwell v. Haight, 2 Barb. R. 549; 3 Kent, Comm. Lect. 43, p. 67, 68; Story on Part. § 160, 161; Howe v. Thayer, 17 Pick. R. 91; Vernon v. Manhattan Co. 17 Wend. R. 524; s. c. 22 Wend. R. 183.

⁴ Ibid.

existed, when published in a fair and reasonable manner, is sufficient.¹ If, however, an ostensible partner still allow his name to remain in the firm, he will continue to be responsible to all persons not knowing his separation therefrom, in like manner as if he were actually a member.²

§ 241. The dissolution of partnership destroys the joint powers and authorities of the partners to employ the partnership property or credit, otherwise than for the purpose of settling up the affairs of the partnership, and winding up the concern. From the moment of the dissolution, the partners become, as to all other business connected with the partnership, distinct persons, and tenants in common of the whole stock. One partner cannot create any new obligations or contracts, so as to bind the partnership; nor can he transact any business on account thereof; nor indorse nor transfer partnership securities to third persons without the consent of all.³

§ 242. There are, however, some powers and authorities, which are absolutely indispensable, in order to wind up the affairs of the partnership after its dissolution; and in relation to such object, the partnership still exists, in a restricted form.

¹ *Shurlds v. Tilson*, 2 McLean, R. 458; *Leroy v. Johnson*, 2 Peters, R. 198; *Ketcham v. Clark*, 6 Johns. R. 144, 148; *Carter v. Whalley*, 1 Barn. & Adolph. 11; *Parkin v. Carruthers*, 3 Esp. R. 248; *Newsome v. Coles*, 2 Camp. R. 617; *Dolman v. Orchard*, 2 Carr. & Payne, 104; *Tombeckbee Bank v. Dumell*, 5 Mason, R. 56.

² *Ibid.* Story on Part. § 160.

³ *Peacock v. Peacock*, 16 Ves. 49, 57; *Wilson v. Greenwood*, 1 Swanst. 480; *Crawshay v. Maule*, 1 Swanst. 506; *Whitman v. Leonard*, 3 Pick. 177; *Kilgour v. Finlyson*, 1 H. Bl. 152; *Brisbane v. Boyd*, 4 Paige, 17; 3 Kent, Comm. Lect. 43, p. 63, 64; *Abel v. Sutton*, 3 Esp. N. P. R. 108; *Lansing v. Gaine & Ten Eyck*, 2 Johns. 300; *Sanford v. Mickles*, 4 Johns. 224; *Foltz v. Pourie*, 2 Dessaus. Ch. R. 40; *Fisher v. Tucker*, 1 McCord, Ch. R. 173; *Poignard v. Livermore*, 17 Martin, 324; *Tombeckbee Bank v. Dumel*, 5 Mason, 56; *Allison v. Davidson*, 2 Dev. N. C.; Eq. Cas. 79, 84.

Hence, every partner may pay and collect debts due to the partnership, and apply the partnership funds to the payment of its debts; he may, also, adjust and settle unliquidated debts; or receive property of the partnership; or give acquittances, and discharges, and receipts, for acts done or moneys paid in behalf of the partnership; and, generally, do any acts which are necessary to conclude the partnership.¹ Yet if such authority have been delegated to one partner in particular, the others would have no authority so as to bind the partnership.

§ 243. Where a partnership is dissolved by the death of one partner, the right of selling all debts and *choses in action* devolves upon the surviving partner or partners, and not upon the executors and administrators of the deceased partner.² The personal representative of the deceased partner becomes, however, a tenant in common with the surviving partners of all the partnership property and effects *in possession*.³ Where the partnership is dissolved by the bankruptcy or insolvency of one of the members, the insolvent or bankrupt member loses all his rights to act as partner, and his assignee is invested with them, and becomes a tenant in common with the solvent partners, for the purpose of winding up the partnership accounts.⁴ All actions brought on account of partnership contracts on property or claims, should be brought in the joint

¹ Fox v. Hanbury, Cowp. 445; Harvey v. Crickett, 5 M. & S. 336; Woodbridge v. Swann, 4 Barn. & Ad. 633; Smith v. Stokes, 1 East, 363; 1 Mont. on Part. App. note 2, *m*, p. 135; 2 Bell, Comm. B. 7, ch. 2, p. 643; Id. p. 637; Combs v. Boswell, 1 Dana, 475; Murray v. Mumford, 6 Cow. 441; Murray v. Murray, 5 Johns. Ch. R. 78.

² Story on Agency, § 328, 339, 346; Ex parte Williams, 11 Ves. R. 5; Wilson v. Greenwood, 1 Swanst. R. 480; Evans v. Evans, 9 Paige, R. 178; 3 Kent, Comm. Lect. 43, p. 63.

³ Ibid.

⁴ Story on Agency, § 337; 3 Kent, Comm. Lect. 43, p. 58; Thomason v. Frere, 10 East, R. 418; Murray v. Murray, 5 Johns. Ch. R. 78; Holderness v. Shackels, 8 Barn. & Cres. 612.

names of the solvent partners and the assignee of the insolvent partner.¹

§ 244. Whether declarations or acknowledgments, made by a partner after the dissolution, in reference to duties, obligations, or transactions of the partnership, before such dissolution, will be binding upon the partners, who have not assented to such declarations, is open to doubt. As for instance, whether a partnership debt, barred by the statute of limitations, can be revived by the acknowledgment of one partner, after the dissolution of the partnership. The doctrine, constantly maintained by the common law courts of England, is that a debt can be so revived. But it has been recently partially overturned by an act of parliament.² In America, the English doctrine obtains in some of the States, and in others it has been expressly overruled. The Supreme Court of the United States held, that such an acknowledgment is not binding, upon the ground that it is a new promise or contract, and not a revival or continuation of the old one. This doctrine seems to have the greatest weight, and to stand upon the best principle.³

¹ Ibid.; Story on Agency, § 338; *Graham v. Robertson*, 2 T. R. 282; *Franklin v. Lord Brownlow*, 14 Ves. R. 557; *Vose v. Philbrook*, 3 Story, R. 336.

² See Story on Part. § 324, and note 1, where the authorities are elaborately discussed; Stat. of 9 Geo. 4, ch. 14, 9th of May, 1825; *Braithwaite v. Britain*, 1 Keen, 206; *Winter v. Innes*, 4 Myl. & Craig, 111; 3 Kent, Comm. Lect. 93, p. 49, 50, 51; *Levy v. Cadet*, 17 Serg. & R. 126; *Walden v. Sherburne*, 15 Johns. 409; *Baker v. Stackpole*, 9 Cowen, 422; *Belote v. Wynne*, 7 Yerg. 534.

³ *Whitcomb v. Whiting*, Doug. 652; *Boydell v. Drummond*, 2 Camp. 157; *Hyleing v. Hastings*, 1 Lord Raym. 389; *Jackson v. Fairbank*, 2 H. Bl. 340; *Clark v. Bradshaw*, 3 Esp. 155; *Braudram v. Wharton*, 1 B. & Ald. 463; *Wood v. Braddick*, 1 Taunt. 104. But see 3 Kent, Comm. Lect. 43, p. 51; Story on Part. 323, and note 1. In *Bell v. Morrison*, 1 Peters, U. S. 351; *Levy v. Cadet*, 17 Serg. & Rawle, 126; *Searight v. Craighead*, 1 Penn. 135;

§ 244 *a*. Ordinarily, however, a dissolution of copartnership ends the powers of the partners to act or contract for each other, except as to matters necessary for the closing up of the partnership affairs.¹ None of the partners can therefore create any new obligations against the partnership, or sell, or purchase goods on account, or subsequently trade with the partnership funds.² So, also, one partner cannot after the dissolution of the firm, bind his copartners by the renewal of a note, even under a general authority "to settle the business of the firm, and for that purpose use their name."³ Nor could he in such case negotiate it in the partnership name.⁴ But where the individual note of a partner, made after the dissolution of the partnership, was transferred to the firm in payment of a debt, it was held, that such note being payable to bearer, might be legally transferred to a third person by another partner who was authorized to settle the partnership accounts.⁵ So, also, a promise by a partner to pay a note on which the firm are indorsers, no notice of dishonor having been given, is not binding on the other members of the firm.⁶

§ 245. Upon a dissolution, each partner has a lien upon the

Yandes v. Lefavour, 2 Blackford, Ind. 371; *Hopkins v. Banks*, 7 Cow. 653; *Baker v. Stackpoole*, 9 Cow. 420; *Brewster v. Hardeman*, Dudley's R. 138, — it is held not to be binding. But see *Roosevelt v. Marks*, 6 John. Ch. R. 266; *Hunt v. Bridghan*, 2 Pick. 581; *Shelton v. Cocke*, 3 Mumf. 191; *Simpson v. Geddes*, 2 Bay, 533.

¹ *Evans v. Evans*, 9 Paige, R. 178; Story on Part. § 324-328.

² See Story on Part. § 322-329; *National Bank v. Norton*, 1 Hill, R. 572; *Crawshay v. Collins*, 15 Ves. R. 218; *Brisban v. Boyd*, 4 Paige, R. 17; *Geortner v. Trustees of Canajoharie*, 2 Barb. R. 625; *Humphreis v. Chastain*, 5 Georgia, R. 166; *French v. Backhouse*, 5 Burr. R. 2727.

³ *National Bank v. Norton*, 1 Hill, R. 572; *Martin v. Kirk*, 2 Humph. R. 529; *McMichen v. Webb*, 6 Howard, U. S. 292.

⁴ *Parker v. Macomber*, 18 Pick. R. 505; *Dickerson v. Wheeler*, 1 Humph. R. 51.

⁵ *Parker v. Macomber*, 18 Pick. R. 505.

⁶ *Schoneman v. Fegley*, 7 Barr, R. 433.

partnership funds, and may require them to be applied to the payment of the partnership debts, so that he may subsequently receive his portion of the remainder, if there be any.¹ But where the partners of a solvent partnership agree to dissolve and divide their joint property, so that they shall own their respective parts in severalty, neither has any remedy in equity against the other, and no lien on the property of the other partners, because of his liability for the debts of the firm or his payment of them.² So, also, no partner, after dissolution, can claim a commission for his services in winding up the affairs of the partnership, unless there be a special agreement therefor.³ And where advances have been made by one partner to the firm, interest would not be allowed thereon in the absence of any evidence of an agreement or understanding to that effect.⁴

§ 246. Courts of equity will protect each partner in his rights, and guard the interest of the partnership, and prohibit any improper or fraudulent proceedings by any partner; and if it be expedient or necessary, will appoint a manager or receiver to make a settlement of the partnership, for the benefit of all parties. So, also, it will compel a partner, making any

¹ Story on Part. § 326; Gow on Part. ch. 5, § 2, p. 235, 236; *Ex parte Ruffin*, 6 Ves. R. 119; *Ex parte Williams*, 11 Ves. R. 5; *Allen v. Center Valley Co.* 21 Conn. R. 130.

² *Holmes v. Hawes*, 8 Iredell, Eq. R. 21; *Lingen v. Simpson*, 1 Sim. & Stu. 600; *Hickman v. M'Fadden*, 1 Swann, R. 258.

³ *Whittle v. McFarlane*, 1 Knapp, R. 312; *Franklin v. Robinson*, 1 Johns. Ch. R. 158; *Caldwell v. Lieber*, 7 Paige, R. 483; *Thornton v. Proctor*, 1 Anstr. R. 94.

⁴ *Lea v. Lashbrooke*, 8 Dana, R. 214; *Jones v. Jones*, 1 Iredell, Eq. R. 332; *Honore v. Colmesnil*, 7 Dana, R. 199; *Dexter v. Arnold*, 3 Mason, R. 284; *Desha v. Smith*, 20 Alab. R. 747; *Waggoner v. Gray*, 2 Hen. & Munf. 603; *Richardson v. The Bank of England*, 4 Mylne & Craig, 165, 172; Story on Part. § 348 *a*. But see *Millar v. Craig*, 6 Beav. R. 433; *Hodges v. Parker*, 17 Verm. R. 242; *Stoughton v. Lynch*, 1 Johns. Ch. R. 467; *Simpson v. Felts*, 1 McCord, Ch. R. 213; *Beacham v. Eckford*, 2 Sandford, Ch. R. 116; *The German Mining Co. in re*, 19 Eng. Law & Eq. R. 591.

composition of partnership debts, to apply it to the benefit of the whole partnership; because it is the duty of a partner to exercise his best skill for the interests of the partnership, as well in closing the affairs after dissolution, as in transacting business during its continuance. So, also, in the division of partnership effects, after the debts have been paid, courts of equity will decree a sale of the property, in preference to a division, when a sale would be most beneficial. And, generally, courts of equity will oversee all the transactions relative to the closing up of the affairs of a partnership, after a dissolution, so that they may be for the benefit of all parties.¹

§ 247. Upon a dissolution, creditors have no lien upon partnership effects for their debts, although partners themselves have, as well for their indemnity, as for their portion of the surplus. The claim of the joint creditors will not avoid a *bonâ fide* alienation, to a purchaser, for a valuable consideration, before judgment and execution.²

¹ Story on Part. § 329-351; *Crawshay v. Maule*, 1 Swanst. 507; *Heathcote v. Hulme*, 1 Jac. & Walk. 122; *Wilson v. Greenwood*, 1 Swanst. ch. 481; *Dacie v. John*, 1 McLell. 206; s. c. 13 Price, 446; Coll. on Part. B. 2, ch. 3, § 5, p. 235; Id. B. 4, ch 1, p. 579, 587, 588; *De Tastet v. Bordenave*, Jacob, 516; 1 Story on Eq. Jurisp. § 671, 672; *Allen v. Kilbre*, 4 Madd. 464; *Ryan v. Mackmath*, 3 Bro. Ch. R. 15; *Brown v. Litton*, 1 P. W. 140; *Stoughton v. Lynch*, 1 Jobn. Ch. R. 467; *Gow on Part. ch. 5*, § 4, p. 354, 3d ed.; *Philips v. Atkinson*, 2 Bro. Ch. R. 272, and Mr. Belt's note; *Estwick v. Conningsby*, 1 Vern. 118; *Hartz v. Schrader*, 8 Ves. 317; *Burden v. Burden*, 1 Ves. & B. 170; *Rigden v. Pierce*, 6 Madd. 353; *Fox v. Hanbury*, Cowp. 445; *Cook v. Collingridge*, Jacob, 607; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

² See 3 Kent's Comm. Lect. 43, and cases there cited; *Hoxie v. Carr*, 1 Sumner, 181, 182.

CHAPTER V.

EXECUTORS AND ADMINISTRATORS.

§ 248. ANOTHER class of agents consists of executors and administrators,¹ who are the personal representatives and agents for the testator, the former being appointed by him in his will, and the latter being appointed by the court having jurisdiction over the probate of wills. The authority of an executor, being given by the will itself, becomes complete upon the death of the testator;² but the authority of the administrator being derived from the court, he cannot exercise his full powers until letters of administration have been granted.³ Therefore, although an executor may bring an action before proving a will, the administrator must wait until letters of administration have issued.⁴ For the same reason, a release, or assignment, or surrender, which would be valid if made by the executor before probate, would not ordinarily be binding, if made by the administrator before he takes out letters of administration.⁵ But after an

¹ The author has been greatly indebted, in the preparation of this abstract of the law relating to executors and administrators, to Mr. Williams's admirable treatise on this subject, to which the student is referred.

² *Hensloe's case*, 9 Co. 38, *a*; *Graysbrook v. Fox*, Plowd. 281; *Woolley v. Clarke*, 5 Barn. & Ald. 744; *Smith v. Mills*, 1 T. R. 480.

³ *Martin v. Fuller*, Comberb. 371; *Wooldridge v. Bishop*, 7 Barn. & Cres. 406; *Phillips v. Hartley*, 3 Car. & Payne, 121.

⁴ *Ibid.*; *Humphreys v. Ingledon*, 1 P. Wms. R. 753.

⁵ *Middleton's case*, 5 Co. R. 28, *b*; *Whitehall v. Squire*, 1 Salk. R. 295; *Rex*

administrator has received letters, the same general rules apply to him as to an executor.

§ 249. There are several kinds of executors and administrators, namely: First, the executor proper, who is appointed legally by will. Second, the executor *de son tort*, as he is called, who is any person, who, no person having been appointed by the will, officiously assumes the office and the duties of an executor.¹ Any intermeddling with goods, which is not done out of mere charity or kindness, but which is an assumption of right over the goods to be administered upon, will be sufficient to render a person an executor *de son tort*. Thus, it has been held, that the taking a Bible or a bedstead; or killing cattle; or using, giving away, or selling goods; or entering upon lands leased and taking possession; or demanding, receiving, or receipting for the debts due to the deceased; or paying debts due from him, will constitute a person executor *de son tort*.² So, also, it constitutes one an executor *de son tort*, to receive money from one who is executor *de son tort*, and apply part to one's own debt, and the remaining sum to the funeral expenses.³ But the performance of offices of mere charity and kindness, such as looking up the goods for preservation, or directing the funeral and paying the expenses thereof, or making an inventory, or feeding his cattle, will not make a person executor *de son tort*.⁴ So, also, if a person

v. Great Glenn, 5 Barn. & Adolph. 188; Williams on Executors, Pt. 1, B. 5, ch. 11.

¹ Williams on Executors, Pt. 1, B. 3, ch. 5, p. 148; Swinburne, Pt. 4, § 23, p. 21. This term was formerly also applied to executors, who were guilty of maladministration. *Stokes v. Porter*, Dyer, 167, *a*.

² Robbin's case, Noy, R. 69; *Stokes v. Porter*, Dyer, R. 167 *a*, 166 *b*; Read's case, 5 Coke, R. 33; *Padget v. Priest*, 2 T. R. 97; Godolph. Pt. 2, ch. 8, § 1; *Mayor of Norwich v. Johnson*, 3 Lev. R. 35; *Anon. Dyer*, R. 56, *a*.

³ *Lysley v. Clarke*, 14 Eng. Law & Eq. 510.

⁴ Williams on Executors, Pt. 1, B. 3, ch. 5, p. 151; Godolph. Pt. 2, ch. 8,

have a colorable title to the goods with which he meddles, or if he act as agent for a rightful executor during the life of the latter, and not otherwise, he will not render himself executor *de son tort*.¹ Whether the acts he did are of such a character as to render him an executor *de son tort*, is a question of law for the court; but what acts he did is a question for a jury.²

§ 250. Again, of administrators there are, 1st. The administrator proper, who is the person appointed by the court, in the absence of any will, to administer the estate of the deceased. 2d. The administrator *cum testamento annexo*, who is appointed by the court in cases where a will has been made, by which either no executor is appointed, or where the executor refuses to accept the office, or is incapable of acting. 3d. The administrator *de bonis non*, who is appointed in the place of the executor, in case the latter dies intestate after having proved the will, but before he has administered the personal estate of the deceased. For in case of the death of an executor before he has administered the estate of the testator, his office is not transmitted to his executor, but is wholly determined.³

§ 251. Any person may be made an executor or administrator, unless he or she be expressly forbidden.⁴ The common rules as to incapacity of persons to contract on their own account, do not apply to their contract in behalf of other persons. Aliens, outlaws, feme covert, infants of any age, and even in

36; Dyer, R. 166, *b*; Fitz. Executor, pl. 24; Harrison *v.* Rowley, 4 Ves. R. 216; Bac. Abr. tit. Executors, (B. 4.)

¹ Femings *v.* Jarrat, 1 Esp. N. P. C. 336; Com. Dig. Admr. (C. 2); Hall *v.* Elliott, Peake, N. P. C. 87; Cottle *v.* Aldrich, 4 Maule & Selw. 175. But see Tomlin *v.* Beck, 1 Turn. & Russ. 438.

² Padget *v.* Priest, 2 T. R. 99.

³ Isted *v.* Stanley, Dyer, R. 372; Hayton *v.* Wolfe, Cro. Jac. 614; Day *v.* Chatfield, 1 Vern. R. 200; 1 Williams on Executors, Pt. 1, B. 3, ch. 4, p. 146.

⁴ 1 Williams on Executors, Pt. 1, B. 3, ch. 1, p. 125.

ventre sa mere, and corporations, may be executors;¹ but idiots and lunatics cannot be executors because of their mental incapacity.²

POWERS OF EXECUTORS.

§ 252. We now propose to consider the powers, duties, and liabilities of executors consecutively. And in the first place as to the powers. An executor or administrator (for their powers are the same after administration is granted to the latter) has the same property in the personal effects and choses in action of the deceased as the latter had while living. He may, therefore, enter the house of the heir or devisee, for the purpose of removing any goods belonging to the deceased, provided the house be open, or the key in the door so that he can unlock it; but he cannot force his way into it by violence, nor can he even break open a chest containing papers, money, or goods belonging to the deceased; and if he cannot obtain them without force, he must bring his action.³ So, also, he has an absolute power to dispose of the whole personal estate, including chattels specifically bequeathed,⁴ so as to give a valid title thereto to every person dealing with him *bonâ fide* and without collusion, even against legatees and creditors.⁵ He

¹ Caroon's case, Cro. Car. 8; Godolph. Pt. 2, ch. 9, § 1; Purefoy v. Rogers, 2 Saund. R. 388, note k.; Wentw. Off. Ex. 375; 1 Williams on Executors, Pt. 1, B. 3, ch. 1; Hix v. Harrison, 3 Bulst. R. 210; Killigrew v. Killigrew, 1 Vern. R. 184; 3 Bacon, Abr. by Gwyllim, p. 5, tit. Executors, (A. 2); Toller, 30, 31.

² Godolph. Pt. 2, ch. 6, § 2; Bac. Abr. Executors, (A. 5); Hill v. Mills, 1 Salk. R. 36.

³ Cobbett v. Clutton, 2 Car. & Payne, 471; 2 Williams on Executors, Pt. 3, B. 1, ch. 1, p. 664.

⁴ Humble v. Bill, 2 Vern. R. 444; Ewer v. Corbet, 2 P. Williams, R. 149; Andrew v. Wrigley, 4 Bro. Ch. R. 137; Burtins v. Stonard, 2 P. Williams, R. 150; 2 Williams on Executors, Pt. 3, B. 1, ch. 1, p. 670; Drohan v. Drohan, 1 Ball & Beat. 185.

⁵ Whale v. Booth, 4 T. R. 625, n. (a); Nugent v. Gifford, 1 Atk. R. 463.

may either mortgage, sell, lease, assign, or pledge all the assets, whether they be goods or choses in action.¹ But if the party with whom he deals fraudulently collude with him, — as if he know that the executor is violating his trust, and acts in fraud of parties beneficially interested, — the transaction will be wholly void for fraud.² The mere fact that a personal creditor of an executor knowingly receives payment of, or security for, his debt out of the assets of the estate, will not of itself render the transaction void at law if there be no fraud,³ but it will in equity, on the ground that the knowledge on the part of the creditor, that the executor is paying a private debt out of assets not personally belonging to him, is a notice of the misapplication, and necessarily involves the creditor in the wrong.⁴ Whenever there has been apparent collusion, however, not only creditors but also legatees may question the validity of the transaction.⁵

§ 253. Where the deceased is the lessee of property for a term of years, it becomes a question what are the rights of the executor in respect thereto. And the rule seems to be now settled, that he is at liberty to underlet or assign the lease, either for the whole term or for a portion thereof, unless the lease to the deceased contain an express condition, that neither he nor his executors nor administrators shall underlet or assign

¹ *Scott v. Tyler*, 2 Dick. R. 725; *Mead v. Orrery*, 3 Atk. R. 239; *M'Leod v. Drummond*, 17 Ves. R. 152; *Andrew v. Wrigley*, 4 Bro. Ch. R. 138; *Mead v. Byington*, 10 Verm. R. 116.

² *Doe v. Fallows*, 2 Crompt. & Jerv. 481; *Scott v. Tyler*, 2 Dick. R. 725; 1 Story, Eq. Jur. § 423, 424, and cases cited.

³ *Whale v. Booth*, 4 T. R. 625, n. (a); *Farr v. Newman*, 4 T. R. 642; *Doe v. Fallows*, 2 Crompt. & Jerv. 481.

⁴ 1 Story, Eq. Jur. § 422, 423; *Hill v. Simpson*, 7 Ves. R. 166; *Bonney v. Ridgard*, 1 Cox, R. 145; *Scott v. Tyler*, 2 Dick. R. 724; *Mead v. Lord Orrery*, 3 Atk. R. 235; *M'Leod v. Drummond*, 17 Ves. R. 154; *Wilson v. Moore*, 1 Mylne & Keen, 126, 337.

⁵ 1 Story, Eq. Jur. § 424; *Hill v. Simpson*, 7 Ves. R. 152; *M'Leod v. Drummond*, 14 Ves. R. 359.

the lease on pain of forfeiture.¹ For although a condition be contained therein, forbidding the lessee to underlet, but not expressly in terms forbidding his executor, the executor is not bound by the condition, but may underlet.² So, also, the death of the lessee does not work a forfeiture of a lease, made on condition that the lease shall not be assigned, but the tenure becomes vested in the executor.³

§ 254. Again, the right of action which a testator or intestate may have upon any choses in action survives to the executor. He may, therefore, bring an action ordinarily upon any obligation, contract, debt, covenant, or duty, whether it be under seal or not, or whether it be written or unwritten, which could have been brought by the person he represents.⁴ But a right to bring an action for a tort to the person does not survive to the executor.⁵ Nor can he have an action for a breach of contract, which solely affects the *person* of the testator or intestate, and does not operate to the injury of his personal estate.⁶ Thus, an executor cannot have an action for a breach of promise of marriage, when no damage has resulted therefrom to the estate; nor for injuries affecting the life or health

¹ 2 Williams on Executors, Pt. 3, B. 1, ch. 1, p. 677; *Seers v. Hind*, 1 Ves. Jr. 294; *Anon. Dyer*, 66 a, Pt. 8; *Phillips v. Everard*, 5 Sim. R. 102; *Roe v. Harrison*, 2 T. R. 429.

² *Ibid.* *Roe v. Harrison*, 2 T. R. 425; *Doe v. Bevan*, 3 Maule & Selw. 357; *Sir William More's case*, Cro. Eliz. 26; *Thornhil v. King*, Cro. Eliz. 757; *Lloyd v. Crispe*, 5 Taunt. R. 249.

³ *Parry v. Harbert*, Dyer, R. 45 b; *Windsor v. Burry*, Dyer, 4, 15.

⁴ Williams on Executors, Pt. 2, B. 3, ch. 1, § 1, p. 556; *Wheatley v. Lane*, 1 Saund. R. 216 a, note (1); *Le Mason v. Dixon*, W. Jones, R. 173, 174; *Devon v. Pawlett*, 11 Vin. Abr. 133, pl. 27; *Crawford v. Whittal*, Doug. R. 4, n.

⁵ Com. Dig. Administrator, (B.) 13; Covenant, (B.) 1; Bac. Abr. Executors, (n.); *Chamberlain v. Williamson*, 2 Maule & Selw. 408; 1 Williams on Executors, Pt. 2, B. 3, ch. 1, § 1, 560, 567.

⁶ *Ibid.*

of the deceased.¹ But he may have an action for all injuries affecting the personal estate, whatever the form of the action may be, whether it be trespass, or trover, or debt on a judgment, provided the subject-matter be damage to the estate, and not solely to the person.²

§ 255. Again, if any tort be committed to the goods and chattels after the death of the testator or intestate, the executor or administrator may bring an action therefor, either in his own name, or in his representative capacity.³ So, also, where there is a breach of a contract made with the executor or administrator, he may sue thereupon, either in his own name, or in his representative character.⁴ So, also, he may bring an action on a judgment recovered by him as executor or administrator, either in his own name, or in his representative character.⁵ But if he take a bond from a simple contract creditor, he cannot bring an action thereon in his representative character, though it be given to him as executor, because the bond, being an obligation of a higher nature than the simple contract, extinguishes it.⁶ Again, if a party die pending an action by him, and before final judgment, his executor or

¹ *Chamberlain v. Williamson*, 2 Maule & Selw. 408; 1 Williams on Executors, Pt. 2, B. 3, ch. 1, § 1, p. 568.

² *Ibid.* *Knights v. Quarles*, 2 Brod. & Bing. 102; *Russell's case*, 5 Co. R. 27 a; *Rutland v. Rutland*, Cro. Eliz. 377; *Williams v. Cary*, 4 Mod. R. 403; *Chamberlain v. Williamson*, 2 Maule & Selw. 408.

³ *Cockerill v. Kynaston*, 4 T. R. 281; *Bollard v. Spencer*, 7 T. R. 358; *Hollis v. Smith*, 10 East, R. 294; *Grimstead v. Shirley*, 2 Taunt. R. 117.

⁴ *Needham v. Croke*, 1 Freem. R. 538; *Thompson v. Stent*, 1 Taunt. R. 322; *Foxwist v. Tremaine*, 2 Saund. R. 208; *Petrie v. Hannay*, 3 T. R. 659; *Smith v. Barrow*, 2 T. R. 477; *Ord v. Fenwick*, 3 East, 104; *Webster v. Spencer*, 3 Barn. & Ald. 364; *Partridge v. Court*, 5 Price, R. 412; s. c. 7 Price, R. 591.

⁵ *Crawford v. Whittall*, Doug. R. 4, (n. 1); *Bonafous v. Walker*, 2 T. R. 126.

⁶ *Hosier v. Lord Arundell*, 3 B. & P. 7; *Partridge v. Court*, 5 Price, R. 419.

administrator may prosecute and defend the cause until final judgment, if the cause of action be one which survives at law.¹

§ 256. If there be several executors, they have a joint and entire interest in the personal estate of the deceased, with a right of survivorship.² They are all regarded as one person, each having an interest in the whole estate, which is incapable of separation from the interest of the others, or of assignment independent of that of the others.³ If, therefore, one executor release his part of a debt, he releases the whole debt.⁴ Each executor is the agent of all the rest, and is fully empowered to dispose of the whole estate by his single act.⁵ If, therefore, any contract be made with one executor, it is made with all, and may be sued by them jointly.⁶ But where there are several executors, they must all join in bringing actions.⁷ Yet, if they do not sue jointly, the defendant can only take advantage thereof by pleading in abatement that there is another executor or administrator, but it is not sufficient for him to plead the general issue.⁸ But an executor cannot, by taking possession of a chattel, real or personal, belonging to the estate, create a new liability, and confer a charge on the other personally in his own individual character, which, without

¹ Act of Congress, Sept. 24, 1789, ch. 20; *Hatch v. Eustis*, 1 Gallison, C. R. 160.

² *Anon. Dyer*, R. 23, *b.*; *Jacomb v. Harwood*, 2 Ves. Sen. 267; *Ex parte Rigby*, 19 Ves. R. 463; *Owen v. Owen*, 1 Atk. R. 495; 3 Bac. Abr. 30, tit. Executors, (D.) 1; 2 Williams on Executors, Pt. 3, B. 1, ch. 2, p. 683; *Flanders v. Clarke*, 3 Atk. R. 509; s. c. 1 Ves. Sen. R. 9.

³ *Ibid.* Godolph. Pt. 2, ch. 16, § 1.

⁴ *Willand v. Fenn*, 2 Selw. N. P. R. 767; *Simpson v. Gutteridge*, 1 Madd. R. 616; *Anon. Dyer*, 23, *b.*; *Jacomb v. Harwood*, 2 Ves. Sen. R. 267.

⁵ *Ibid.* *Powell v. Evans*, 5 Ves. R. 844.

⁶ *Nation v. Tozer*, 1 Crompt. Mees. & Rosc. 174.

⁷ *Smith v. Smith*, Yelv. R. 130; *Brookes v. Stroud*, 1 Salk. R. 3; *Hensloe's case*, 9 Co. R. 37.

⁸ *Cabell v. Vaughan*, 1 Saund. R. 291, note.

such act, would not have existed.¹ Thus, if an executor take possession of a tenure belonging to the testator, and personally enjoy it, his co-executor is not thereby charged as joint occupant.² It was at one time asserted, that administrators had not the same powers with executors to bind each other by the separate act of one, but that they must act jointly, as their power was not given by the testator.³ But this doctrine has been since overruled, and it has been held, that administrators stand in this respect on the same footing with executors.⁴

§ 257. It follows, from what has been said, that several executors or administrators cannot ordinarily sue a defendant, who has made a joint contract with one of the executors or administrators.⁵ Indeed, generally speaking, one executor or administrator, cannot sue his co-executor or administrator, nor can the survivors of several executors sue the executor of the deceased executor.⁶ Yet, if a debtor make his creditor one of his executors, and he neither prove the will nor act as executor, he may be sued by the others.⁷

§ 258. The powers of an executor, as we have seen, survive to his co-executor, and do not go to his personal executor. And the same rule also applies to administrators.⁸ Where,

¹ Williams on Executors, Pt. 3, B. 1, ch. 2, p. 685; *Nation v. Tozer*, 1 Crompt. Mees. & Rose. 171.

² Ibid.

³ By Lord Hardwicke in *Hudson v. Hudson*, 1 Atk. R. 460.

⁴ *Willand v. Fenn*, cited 2 Ves. Sen. R. 267; Selw. N. P. C. 767, note (8), 6th ed.; *Jacomb v. Harwood*, 2 Ves. Sen. R. 267.

⁵ ——— *v. Adams*, 1 Younge, 117; *Moffat v. Van Milligen*, 2 Bos. & Pull. 124 n. (c); *Fitzgerald v. Boehm*, 6 B. Moore, R. 332; *Godolph. Pt. 2*, c. 16, § 2.

⁶ Ibid. Went. Off. Executors, 75; 2 Williams on Executors, Pt. 3, B. 1, ch. 2, p. 691.

⁷ *Dorchester v. Webb*, W. Jones, R. 345; *Rawlinson v. Shaw*, 3 T. R. 557; *Gleadow v. Atkin*, 2 Crompt. & Jerv. 548.

⁸ *Flanders v. Clarke*, 3 Atk. R. 509; *Hudson v. Hudson*, Cas. Temp. Talb.

however, a power is given to the executors, naming them, to sell, it does not, at common law, survive to the others on the death of one.¹ But if there be a power given to the executors generally, not naming them, and more than one survive, the survivors may sell.² It would also seem, that a single survivor could sell, but this is doubtful.³ In such cases, however, equity would give relief even though all should die, by executing the trust itself.⁴

§ 259. An executor or administrator is not entitled to any allowance or commission for his labor and services, in executing his trust, either at law or in equity;⁵ but he is entitled to be reimbursed for all reasonable expenses and outlays,⁶ which do not arise from his default.⁷

DUTIES OF EXECUTORS AND ADMINISTRATORS.

§ 260. In the next place, as to the duties of executors and administrators. The first duty of the executor is to bury the deceased in a manner suitable to his condition and estate.⁸ He is not, however, entitled to expend an extravagant sum therefor, but is limited to such expenses as, considering the ap-

127; *Eyre v. Lady Shaftsbury*, 2 P. Wms. 121; *Jacomb v. Harwood*, 2 Ves. Sen. R. 268; *Townsend v. Wilson*, 1 Barn. & Ald. 608.

¹ 1 Sugden on Powers, 141, 6th ed.; Co. Litt. 113, *a*.

² *Ibid*.

³ *Dyer*, R. 219; *Howel v. Barnes*, Cro. Car. 382; *Anon. Dyer*, R. 371; Co. Litt. 113, *a*, and Hargrave's note; 1 Sugden on Powers, 144.

⁴ 2 Williams on Executors, Pt. 3, B. 1 and 2, p. 690; 1 Sugden on Powers, 144; Co. Litt. 113, *a*, and note by Mr. Hargrave.

⁵ *Schieffelin v. Stewart*, 1 Johns. Ch. R. 623; *Robinson v. Pett*, 3 P. Wms. 251; *Brocksope v. Barnes*, 5 Madd. R. 90.

⁶ *Macnamara v. Jones*, Dick. R. 587; *Potts v. Leighton*, 15 Ves. R. 277; *Hide v. Haywood*, 2 Atk. R. 126.

⁷ *Pannell v. Fenn*, Cro. Eliz. 348.

⁸ 2 Black. Comm. 508; *Shelley's case*, 1 Salk. 296.

parent estate and rank of the deceased, seem reasonable and proper.¹ If he exceed these, and the estate prove to be insolvent, he cannot recover therefor.² An executor is not, however, limited to any specified sum, but each case must be regulated by its peculiar circumstances.³

§ 261. In the next place, it is the duty of an executor to prove the will, or to take out letters of administration, to make an inventory of the personal estate, and to collect the effects belonging to the estate; this he must do with diligence.⁴ If, however, he omit to make an inventory, this fact cannot be taken advantage of against him, after the lapse of an unreasonable length of time.⁵

§ 262. In the next place, it is the duty of the executor or administrator to pay the debts due from the estate of the deceased. For this purpose, the personal estate ordinarily forms the primary fund to be used, and the real estate does not become chargeable with the payment of debts, until the personal estate is exhausted; and in case of the exhaustion of the personal estate in the hands of the executor, the real estate not being placed under his control, the remedy of creditors against the real estate is not against the executors, but the heirs.⁶ It may,

¹ *Ibid.* *Edwards v. Edwards*, 2 Crompt. & Mees. 612; *Hancock v. Podmore*, 1 Barn. & Adolph. 260; *Stag v. Panter*, 3 Atk. 119.

² *Stag v. Panter*, 3 Atk. R. 119.

³ *Edwards v. Edwards*, 2 Crompt. & Mees. 612; *Reeves v. Ward*, 2 Scott, R. 395; *Stag v. Panter*, 3 Atk. 119; *Hancock v. Podmore*, 1 Barn. & Adolph. 260.

⁴ 2 Williams on Executors, Pt. 3, B. 2, ch. 1, § 1, 2, 3; *Hooker v. Bancroft*, 4 Pick. R. 50; *Walker v. Hall*, 1 Pick. R. 20.

⁵ *Ritchie v. Rees*, 1 Add. R. 144; *Pitt v. Woodham*, 1 Hagg. R. 247; *Bowles v. Harvey*, 4 Hagg. R. 241; *Higgins v. Higgins*, 4 Hagg. R. 242.

⁶ 2 Williams on Executors, Pt. 4, B. 1, ch. 2, § 1, p. 1201, note (4); *Jefferson v. Morton*, 2 Saund. R. 7; *Hancock v. Minot*, 8 Pick. R. 29; *Hays v. Jackson*, 6 Mass. R. 149; *Drinkwater v. Drinkwater*, 4 Mass. R. 354; *Stearns v. Stearns*, 1 Pick. R. 157.

however, happen that the testator makes his real estate chargeable with his debts either expressly or by implication, as by devising his estate to the executor in trust for the payment of debts, or to other persons "after payment of his debts," or "his debts being first paid." And in such case, there is no doubt that the real estate is chargeable with the debts;¹ but whether it be *primarily* chargeable or not, depends upon whether the words of the will manifest a clear and unequivocal intention on the part of the testator to discharge his personal estate. For although the real estate be charged with the payment of debts, this mere fact does not necessarily import an intention to exempt the personal estate, which is naturally the primary fund. To make the real estate primarily liable, it must, therefore, appear, not only that it is charged with the payment of debts, but that the personal estate is discharged therefrom.² It is not, however, necessary that the personal estate should be expressly exempted, if it clearly appear to have been the intention of the testator to discharge it and to render the real estate the primary fund.³ To prove this, however, all evidence extrinsic to the will is to be excluded.⁴

§ 262 *a*. Where a testator disposes, by legacy, of all his personal estate, and devises to his executor all his real estate, directing him to pay all just debts and charges, such debts would

¹ 2 Story, Eq. Jurisp. § 1246, and cases cited; *King v. Dennison*, 1 Ves. & B. 273; *Thomas v. Britnell*, 2 Ves. Sen. R. 314; 2 Powell on Devises, by Jarman, ch. 34, p. 653; *Graves v. Graves*, 8 Sim. R. 43, 54; *Thompson v. Brown*, 16 Mass. R. 172; *Clarke v. Tufts*, 5 Pick. R. 337.

² *Tait v. Northwick*, 4 Ves. R. 824; *Dolman v. Smith*, Prec. Ch. 456; *Bootle v. Blundell*, 1 Meriv. R. 230; *Dawes v. Scott*, 5 Russ. R. 32; *White v. White*, 2 Vern. R. 43; *Tower v. Rous*, 18 Ves. R. 132; 2 Williams on Executors, Pt. 4, B. 1, ch. 2, § 1, and cases therein cited; 2 Story, Eq. Jurisp. § 1247.

³ *Bootle v. Blundell*, 1 Meriv. R. 219, 230; *Dawes v. Scott*, 5 Russ. R. 32.

⁴ *Ibid.* *Inchiquin v. French*, 1 Cox, R. 9; *Stephenson v. Heathcote*, 1 Eden, R. 39; *Andrews v. Emmot*, 2 Bro. Ch. R. 297.

be chargeable upon the real estate.¹ So, also, if the personal estate be generally disposed of, and the real estate devised to the executor, who is made residuary legatee, the same rule would be held.²

§ 263. Ordinarily, however, the executor or administrator is only bound to pay the debts out of the personal estate; and

¹ *Henvell v. Whitaker*, 3 Russ. R. 343; *Finch v. Hattersley*, 3 Russ. R. 345; *Hassel v. Hassel*, 2 Dick. R. 527; *Bench v. Biles*, 4 Madd. R. 187.

² *Dover v. Gregory*, 10 Simons, R. 393. In this case the Vice-Chancellor, (Sir L. Shadwell,) said: "I perfectly well recollect, that the case of *Henvell v. Whitaker* was argued with great earnestness on both sides; and I must say, that, in my opinion, the decision in that case is right. I am willing, that this will should be construed according to the intention of the testator. First of all, there is a plain intention, that the executor should pay the debts, and the funeral expenses, of course; and it does not amount to an evidence of intention, that he is not to pay the debts, because he is to pay the funeral expenses. And, as the testator says, 'I order and ordain, that all my just debts and funeral expenses, and the charges of proving this my will, shall be fully discharged, by my executor hereinafter named,' he denotes an intention, that his executor should pay his debts, and should pay them by the means which the testator has supplied him with, either by a gift of property or by suffering it to descend. If the heir had been a stranger, there would have been sufficient in the will to enable him to take the fee. There is an intention, that he should pay the debts; and the fact, that the testator gives the copyholds, without words of inheritance, shows that he meant that the debts should be paid out of the copyholds. The court, in construing a will, is bound to give a meaning to every word, if it can; and not to reject any words as being surplusage, if it can be avoided. I admit that the expression, 'residuary legatee,' ordinarily, would apply to a person who is to take the undisposed of personal estate. But, where the testator has given all the rest and residue of his estate and effects whatsoever or wheresoever, or of what nature or kind soever, unto and to the use of his son, John Ayer, and then says, 'whom I hereby appoint sole executor and residuary legatee of this my will,' those words may be fairly construed to mean, that he intended his son should take all his property, of every description, which he had not before given. I think that I am bound by the case of *Henvell v. Whitaker*, to hold, that the debts, in this case, are charged on the copyholds." See *Parker v. Marchant*, 1 Younge & Coll. New R. 290. See, when the personal estate is deemed exonerated by a charge of debts upon the real estate, *Colville v. Middleton*, 3 Beavan, R. 570. See also 2 Story, Eq. Jurisp. § 1247 a.

it is in respect to the personal estate solely, that we shall consider his duties. The first class of debts which he is bound to pay, is the funeral expenses, as far as they are reasonable and proper.¹ The second class is for the expenses of probate and taking out administration, and of any suit, which it may be necessary for him to bring,² together with the fees of the attorney and solicitor.³ The third class of debts consists of debts due to the State or crown by record or by specialty; not including debts which are of any other kind.⁴ The fourth class embraces any debts to which priority is given by statute. The fifth class embraces all debts of record, and comprises, 1st. Judgments of a court of record against the deceased, which take precedence of other debts of record, whether they be prior in point of time or not.⁵ This class does not include judgments against the executor or administrator, which are only entitled to a priority over debts of an equal degree, upon which judgment has not been obtained.⁶ It does not matter, however, whether the judgment be upon a specialty or simple contract; it is in either case, equally entitled to precedence.⁷ Among the judgment creditors, he who first sues out execution is entitled to priority over the others, but otherwise all judgment creditors stand on the same footing.⁸ Final decrees of a court of equity are entitled to the same priority as judgments

¹ *Rex v. Wade*, 5 Price, 621; 2 Black. Comm. 508.

² 2 Black. Comm. 511; *Loomis v. Stotherd*, 1 Sim. & Stu. 458; 2 Williams on Executors, Pt. 3, B. 2, ch. 2, § 1.

³ *Turwin v. Gibson*, 3 Atk. R. 720.

⁴ *Littleton v. Hibbins*, Cro. Eliz. 793; Went. Off. 261; Com. Dig. Ex. Administrator, (C. 2); 2 Williams on Executors, Pt. 3, B. 2, ch. 2, § 1, p. 721; *Erby v. Erby*, 1 Salk. R. 80.

⁵ *The Sadler's Case*, 4 Co. R. 59 b, 60 a; *Harrison's Case*, 5 Co. R. 28 b; Went. Off. Ex. 271; *Searle v. Lane*, 2 Vern. R. 89.

⁶ *Ashley v. Pocock*, 2 Atk. R. 308; 2 Williams on Executors, Pt. 3, B. 2, ch. 2, § 2, p. 729; *Scott v. Ramsey*, 1 Binn. R. 221; *Center v. Billingham*, 1 Cowen, R. 33; *Leiper v. Lewis*, 15 Serg. & Rawle, 108.

⁷ *Toller*, 264; 2 Williams on Executors, Pt. 3, B. 2, ch. 2, § 11, p. 731.

⁸ *Ibid.* Went. Off. Ex. 269.

at law.¹ But an executor or administrator, cannot plead a decree in equity in defence of an action at law, but must resort to an injunction in equity.² 2d. Recognizances and statute securities, such as statutes merchants, statutes staple, and recognizances in the nature of statutes staple, are entitled to the next priority after judgments.³ The sixth class embraces debts by specialty, under which are reckoned debts by bond, by covenant, and breaches of contracts under seal, and debts by mortgage, where there is bond or covenant for the payment of money.⁴ One specialty debt does not take precedence of another merely because the former is overdue and the latter not due.⁵ But a specialty, which is contingent, as a bond of indemnity, is postponed to debts of an inferior degree,⁶ until breach of condition.⁷ The seventh and last class of debts consists of those created by a contract not under seal; and of these, debts to the State or king must be first paid,⁸ and next the wages of laborers and domestic servants.⁹

§ 264. And here a distinction should be observed between legal and equitable assets. Legal assets are all property of which the executor or administrator *virtute officii* becomes the

¹ *Smith v. Eylis*, 2 Atk. R. 385; *Shafto v. Powell*, 3 Lev. 355; *Peploe v. Swinburn*, Bunb. R. 48; *Astley v. Powis*, 1 Ves. Sen. R. 496; *Searle v. Lane*, 2 Vern. R. 89.

² *Stasby v. Powell*, 1 Freem. R. 334; *Harding v. Edge*, 1 Vern. R. 143.

³ 2 Williams on Executors, Pt. 3, B. 2, ch. 3, § 2, p. 732, 733.

⁴ *Galton v. Hancock*, 2 Atk. R. 435; *Jones v. Powell*, 1 Eq. Cas. Abr. 84; *Lomas v. Wright*, 2 Mylne & Keen, 769; *Broome v. Monck*, 10 Ves. R. 620; *Benson v. Benson*, 1 P. Williams, R. 130; *Turner v. Wardle*, 7 Sim. R. 80.

⁵ 1 Roll. Abr. 927, tit. Executors; 2 Williams on Executors, Pt. 3, B. 2, ch. 2, § 2, p. 744, 745.

⁶ *Harrison's Case*, 5 Co. R. 28, (b); *Phillips v. Echard*, Cro. Jac. 8; *Miller v. Sheffield*, Cro. Jac. 102; *Lancy v. Fairechild*, 2 Vern. R. 101; *Hawkins v. Day*, Ambl. R. 160; *Read v. Blunt*, 5 Sim. R. 567.

⁷ *Cox v. Joseph*, 5 T. R. 307; *Musson v. May*, 3 Ves. & Beam. R. 194.

⁸ 3 Bac. Abr. 80, tit. Executors, (L.) 2.

⁹ 2 Black. Comm. 511.

trustee and disposer.¹ Equitable assets are all property not falling under the class of legal assets, which, although they would otherwise not be chargeable with the payment of debts or legacies,² are made so by the special terms of the will. Legal assets can be reached through an action at law, but equitable assets require the aid of a court of equity. In administering legal assets, courts of equity follow the rules of courts of law, and give them priority according to their nature and degree.³ But in administering equitable assets, courts of equity require that they should be distributed equally among the creditors or legatees, without reference to the nature or degree of the debts, and if the fund be insufficient for the payment of all the debt, each is abated proportionally.⁴ The same rule also applies to the equitable assets, charged with the payment of legacies, unless some special priority be expressly given by the testator.⁵ But where equitable assets are charged with the payment of both debts and legacies, and are insufficient to pay both, debts take precedence of legacies, and legatees can take nothing until the debts are paid;⁶ and this rule is founded on the doctrine that a man must be just before he undertakes to be generous. Again, courts of equity will marshal the assets, that is, so arrange the different funds out of which debts and legacies are to be paid, as to enable, as far as possible, all legatees and debtors to receive their proper proportion of

¹ 1 Story, Eq. Jurisp. § 551, and cases cited; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1; *Farr v. Newman*, 4 T. R. 621; *Whale v. Booth*, 4 T. R. 625; *Silk v. Prime*, 1 Bro. Ch. R. 138, note.

² 1 Story, Eq. Jurisp. § 552, and cases cited; *Wilson v. Fielding*, 2 Vern. R. 763; *Gott v. Atkinson*, Willes, R. 523; *Lewin v. Okeley*, 2 Atk. R. 50.

³ 1 Story, Eq. Jurisp. 553; *Wride v. Clarke*, 1 Dick. R. 382; *Morrice v. The Bank of England*, Cas. Temp. Talb. 220.

⁴ 1 Story, Eq. Jurisp. § 554, and cases cited; *Hixon v. Wytham*, 1 Cas. Ch. 248; *Turner v. Turner*, 1 Jac. & Walker, 39; *Creditors of Sir Chas. Cox*, 3 P. Wms. R. 343; *Deg v. Deg*, 2 P. Wms. R. 412; *Wride v. Clarke*, 1 Dick. R. 382; *Wilson v. Paul*, 8 Sim. R. 63.

⁵ 1 Story, Eq. Jurisp. § 555; *Brown v. Brown*, 1 Keen, R. 275; *Hixon v. Wytham*, 1 Cas. Ch. 258.

⁶ *Ibid.*; *Walker v. Meager*, 2 P. Wms. R. 550; *Anon.* 2 Vern. R. 405.

the estate.¹ If there be two or more funds, against which there are several claimants, and one party may resort to either fund, but the other parties can only resort to one, they will oblige the first party either to satisfy his claim out of the fund on which the others have no lien,² or, if that would occasion injustice, to elect which fund he will proceed against, and if he proceed against the one against which the others also are entitled to proceed, the others will be substituted in his place against the fund to which he was solely entitled, to the extent of his interest.³ The consideration of this question does not, however, properly belong to this treatise.

§ 265. In respect to debts of the same class, and which are entitled to no legal or equitable precedence over each other, the executor or administrator is privileged to pay them in any order he may elect, and may give precedence to whichever he chooses.⁴ He may, therefore, give a preference to his own debt over all others of an equal degree.⁵ But he cannot retain payment for the whole of his own debt out of equitable assets, but only out of legal, and in such case he is limited to his proportional part.⁶ Again, if the testator appoint his debtor to be his executor, the debt becomes thereby extinguished; for

¹ 1 Story, Eq. Jurisp. § 558, et seq. and cases cited, where this whole question is thoroughly discussed.

² *Aldrich v. Cooper*, 8 Ves. R. 388; *Lanoy v. Duke of Athol*, 2 Atk. R. 446; *Attorney-General v. Tyndall*, Amb. R. 614; *Selby v. Selby*, 4 Russ. R. 336; *Colchester v. Stamford*, 2 Freem. R. 124; *Dorr v. Shaw*, 4 Johns. Ch. R. 17; *Cheesebrough v. Millard*, 1 Johns. Ch. R. 412.

³ *Sagittary v. Hyde*, 1 Vern. R. 445; *Neave v. Alderton*, 1 Eq. Abr. 144; *Galton v. Hancock*, 2 Atk. R. 436; *Aldrich v. Cooper*, 8 Ves. 389; *Trimmer v. Bayne*, 9 Ves. R. 210.

⁴ *Lyttleton v. Cross*, 3 Barn. & Cress. 322; *Lepard v. Vernon*, 21 Ves. & Beam. 53; *Waring v. Danvers*, 1 P. Wms. R. 295.

⁵ *Woodward v. Lord Darcy*, Plowd. 184, Dyer, 2 a; *Warner v. Wainsford*, Hob. R. 127.

⁶ *Anon.* 2 Cas. Chan. 54; *Hopton v. Dryden*, Prec. Chan. 181.

the executor could not maintain an action against himself for it.¹

§ 266. In the next place, after payment of all the debts, it is the duty of the executor or administrator to pay the legacies. Before payment of the legacies, however, the testator is bound to pay all vested debts, and if he do not, and the estate is not sufficient to pay the debts, he renders himself personally liable therefor to the extent of his misappropriation. So, also, if there be only *contingent* debts against the estate, it would seem that the executor cannot pay legacies, without assuming contingent liabilities, and, therefore, he would not be bound to pay over the legacies until all contingent liability on the debt was gone, unless upon the legatee's giving him ample indemnity therefor, as by a security to refund the legacy, if debts should afterwards appear.² Again, if the executor pay over legacies in ignorance of the existence of any debts outstanding against the estate, he cannot ordinarily plead in defence to an action for such debts, *plene administravit*, for he is bound to pay debts before legacies.³ He may, however, in such a case, compel the legatees by will to refund.⁴ And if a great lapse of time have taken place, and the creditors have been guilty of great laches, it would seem that such a plea would be good.⁵

§ 267. Where a legacy is given generally, without specify-

¹ Co. Litt. 264, (b) ; Went. Off. Executors, ch. 2, p. 73 ; Fryer v. Gildridge, Hob. R. 10 ; Dorchester v. Webb, Cro. Car. 373 ; Wankford v. Wankford, 1 Salk. R. 299 ; Errington v. Evans, 2 Dick. R. 457 ; Cheetham v. Ward, 1 Bos. & Pul. 630.

² Hawkins v. Day, Ambl. R. 160, 3 Meriv. 554 ; Nector v. Gennet, Cro. Eliz. 466 ; Simmonds v. Bolland, 3 Meriv. 549 ; Vernon v. Egmont, 1 Bligh, N. S. 571.

³ Davies v. Blackwell, 9 Bing. R. 5 ; s. c. 2 Moore & Scott, 8 ; Norman v. Baldry, 6 Sim. R. 621 ; Richards v. Browne, 3 Bing. N. S. 493.

⁴ Nelthrop v. Biscoe, 1 Chan. Cas. 136 ; Davis v. Davis, 8 Vin. Abr. 423, tit. Devise, (2 d.) ; 1 Roper on Legacies, 398, (3d ed.)

⁵ Ibid. ; Chelsea Water Works v. Cowper, 1 Esp. N. P. C. 275.

ing the time of payment, the executor is not bound to pay it over until the lapse of a year from the testator's death; and this is allowed him for the sake of convenience, and to enable him to see whether the assets are sufficient without it, to pay the debts.¹ The legacy, however, vests in the legatee on the death of the testator, and if the legatee die before recovering it, his personal representative will be entitled to it.²

§ 268. If the assets be not sufficient to pay all the legacies, the specific legacies take precedence of the general legacies, and in case there are more than enough assets to pay the specific legacies, but not enough to pay the general legacies, the latter alone are abated, so as to give to each general legatee his proportion of the overplus.³ A specific legacy is a legacy of some identified thing, distinguished from all others of the same kind; as a legacy of the "diamond ring presented to me by A."⁴ A general legacy is a legacy of something indeterminate or not specific, as a legacy of a "diamond ring," or of "£1,000," which is satisfied by a delivery of any diamond ring, or £1,000 in any form of money or stock.⁵ An executor has no power to give himself a preference in respect to the payment of a legacy to himself, as he has in the payment of a debt.⁶

§ 269. The general rule in respect to general legacies is, that no preference shall be given to one over another, but that, in case of a deficiency of assets, they shall all abate proportionally.⁷ But

¹ *Garthshore v. Chalie*, 10 Ves. R. 13; 2 Williams on Executors, Pt. 3, B. 3, ch. 2, § 5, p. 880; *Forbes v. Ross*, 2 Cox, R. 115.

² *Ibid.* *Collins v. Macpherson*, 2 Sim. R. 87.

³ *Clifton v. Burt*, 1 P. Wms. R. 679; 2 Black. Comm. 513; *Toller*, 339; 2 Williams on Executors, Pt. 3, B. 3, ch. 4, § 2, p. 972.

⁴ 2 Williams on Executors, Pt. 3, B. 3, ch. 2, § 3, p. 838; *Fonbl. Ex. B.* 4, ch. 2, § 5, note (o); *Purse v. Snaplin*, 1 Atk. R. 416.

⁵ *Ibid.*

⁶ *Toller*, 387; 2 Williams on Executors, Pt. 3, B. 3, ch. 4, § 2, p. 972.

⁷ *Shirt v. Westby*, 16 Ves. R. 396; *Coppin v. Coppin*, 2 P. Wms. R. 296;

this rule only applies to legacies to volunteers, without valuable consideration; and in cases where there is any valuable consideration to support a legacy, as if it be in consideration of a relinquishment of dower, or of any legal claim, existing at the time of the testator's death, it will take precedence of other general legacies.¹ So, also, if the manifest intent of the testator be to give a priority to any particular legacy, his intention must be carried into effect.²

§ 270. Where a legacy is left to an infant, the executor cannot, without the sanction of a court of equity, pay it to him, or to any one on his account, but he must keep it until the infant become of age, and then pay it over to him personally.³ And if the executor pay it over to the father, or any one else, he will be responsible.⁴ Again, an executor cannot pay to the infant any part of the capital of the legacy for any purpose except for mere necessities.⁵ But in respect to the interest, he may pay over whatever a court of equity would have ordered him to pay over,⁶ and a court of equity will always order that the interest be paid over to the infant for his maintenance, in case the bequest is vested so that he could take it immediately, if he were of age, provided his parents

Fretwell v. Stocy, 2 Vern. R. 434; *Apreece v. Apreece*, 1 Ves. & Beam. 364; *Blower v. Morrett*, 2 Ves. Sen. 420.

¹ *Heath v. Dendy*, 1 Russ. Ch. Cas. 543; *Davies v. Bush*, 1 Younge, R. 341; *Burridge v. Bradyl*, 1 P. Wms. R. 127; *Blower v. Morret*, 2 Ves. Sen. 420; *Davenhill v. Fletcher*, Ambler, R. 244.

² *Lewin v. Lewin*, 2 Ves. Sen. 415; *Marsh v. Evans*, 1 P. Wms. R. 668; *Attorney-General v. Robins*, 2 P. Wms. R. 23.

³ *Dagley v. Tolferry*, 1 P. Wms. R. 285; *Cooper v. Thornton*, 3 Bro. Ch. R. 97; *Rotherham v. Fanshaw*, 3 Atk. R. 629; *Philips v. Paget*, 2 Atk. R. 80.

⁴ *Ibid.*

⁵ *Davies v. Austen*, 3 Bro. Ch. R. 178; *Lee v. Brown*, 4 Ves. R. 362; *Walker v. Witherell*, 6 Ves. R. 473.

⁶ *Ibid.*; 1 Ross on Leg. 768, (3d ed.); *Lee v. Brown*, 4 Ves. R. 362.

are unable to maintain him, and not otherwise.¹ If the legacy be contingent, a court of equity will not order the executor to pay the interest to the infant, unless perhaps by consent of the legatees over.²

§ 271. Where a legacy is left to a married woman, it should be paid over to her husband, whether she live with him or be separated by divorce.³ But if the wife be separated from her husband, without criminality on her part, a court of equity would interfere, and oblige the husband to make a settlement on her, as the condition of the payment of the legacy to him.⁴ But although the husband should refuse to make a settlement on the wife, it seems that he would be entitled to receive the interest in the legacy.⁵

§ 272. Where the legatee is abroad, and has been unheard from for such a number of years as to create a presumption of his death, the legacy may perhaps be paid to the succeeding party entitled to it,⁶ but it is safer for the executor to take a bond of indemnity.

§ 272 *a*. Whether, if a will should contain a direction or power to raise money out of the rents and profits of the estate,

¹ *Greenwell v. Greenwell*, 5 Ves. R. 191; *Collis v. Blackburn*, 9 Ves. R. 470; *Stretch v. Watkins*, 1 Madd. R. 253; *Andrews v. Partington*, 3 Bro. C. C. 60, 401; *Hoster v. Pratt*, 3 Ves. R. 733; *Maberly v. Turton*, 14 Ves. R. 499; *Hawkins v. Watts*, 7 Sim. R. 199.

² *Lomax v. Lomax*, 11 Ves. R. 48; *Errington v. Chapman*, 12 Ves. R. 21; *Cavendish v. Mercer*, 5 Ves. R. 195, n.; *Evans v. Massey*, 1 Younge & Jerv. 196.

³ *Palmer v. Trevor*, 1 Vern. R. 261; *Stephens v. Totty*, Cro. Eliz. 908; *Green v. Otte*, 1 Sim. & Stu. 250; *Carr v. Eastabrook*, 4 Ves. R. 146.

⁴ *Brown v. Elton*, 3 P. Wms. R. 202; *Lady Elibank v. Montolieu*, 5 Ves. R. 727; *March v. Head*, 3 Atk. R. 720; 1 Roper on Leg. 773, (3d ed.)

⁵ *Sleech v. Thorington*, 2 Ves. Sen. 562.

⁶ *Dixon v. Dizon*, 3 Bro. Ch. R. 510; *Mainwaring v. Baxter*, 5 Ves. R. 458.

the executor would be authorized to sell or mortgage the estate in case the annual rents and profits would not satisfy the purposes of the trust, without entailing serious delays and inconveniences, is a question upon which entirely opposite opinions have been held. By the older cases, the executor was restrained to the application of the annual rents and profits,¹ but the later cases admit a power to sell or mortgage, where it is required to carry out the manifest objects of the trust.² If, therefore, a testator should direct a gross sum to be paid out of the rents and profits of an estate at a fixed time, or for a definite purpose, which must be accomplished within a certain time, and the annual rents and profits would be inadequate to pay such sum within the intended time, a power to sell or mortgage would be allowed in equity.³

INTEREST ON LEGACIES.

§ 273. Where a specific legacy is given, it is appropriated to the legatee from the death of the testator, and any

¹ *Ivy v. Gilbert*, 2 P. Wms. R. 13, 19; *Trafford v. Ashton*, 1 P. Wms. R. 418, and note by Mr. Cox; *Evelyn v. Evelyn*, 2 P. Wms. R. 666-670; *Mills v. Banks*, 3 P. Wms. R. 1; *Okeden v. Okeden*, 1 Atk. R. 550, and note by Mr. Saunders.

² *Green v. Belchier*, 1 Atk. R. 505; *Baines v. Dixon*, 1 Ves. R. 42; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. Jr. R. 233; s. c. 3 Bro. Ch. R. 120; *Allan v. Backhouse*, 2 Ves. & Beames, 64.

³ In *Bootle v. Blundell*, 1 Meriv. R. 193-233, Sir Thomas Plumer, speaking on this question, says of the phrase, "rents and profits":—"Whatever might have been the interpretation of these words, had the case been new, whatever doubt might have arisen upon them, as denoting annual or permanent profits, it is now too late to speculate; this Court having, by a technical, artificial, but liberal construction, in a series of authorities, admitting it not to be the natural meaning, extended those words, when applied to the object of raising a gross sum at a fixed time, when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by other words." See also 2 Story, Eq. Jurisp. § 1064 a, where this construction is said by Mr. Justice Story to be "neither artificial or technical, although it is certainly a liberal construction of the words of the testator, in order to accomplish his intent."

increase which may accrue to it in the intermediate time between the death of the testator and the delivery of the thing, belongs to the legatee.¹ Nor does it matter in this respect whether the delivery be postponed by the testator to a certain specified time.² Again, interest is allowed on general legacies after the lapse of a year from the testator's death, if no time of payment be appointed; but all interest which accrues within the year belongs to the residuary legatee.³ Nor does it matter that payment of legacies be impracticable at the end of the year, they nevertheless will carry interest, which the executor is bound to pay, if there be sufficient assets to enable him to do so.⁴ There are two exceptions to this general rule, however, which obtain whenever the legacy is given in payment of a debt,⁵ or is bequeathed to an infant child, in both of which cases, interest is allowed from the time of the testator's death.⁶

§ 274. When a time is appointed at which the legacy shall be paid, it must be paid at that time, and interest begins to run thereafter, and not before.⁷ There is also an exception to this rule in favor of legacies to infant children, where there is no other provision for their maintenance,⁸ and to persons to whom the testator stands *in loco parentis*, whenever there is a

¹ *Pearson v. Pearson*, 1 Sch. & Lef. 10; *Laundy v. Williams*, 2 P. Wms. R. 481; *Sleech v. Thorington*, 2 Ves. Sen. R. 563.

² *Barrington v. Tristram*, 6 Ves. R. 345.

³ *Pearson v. Pearson*, 1 Sch. & Lef. 10; *Wood v. Penoyre*, 13 Ves. R. 334.

⁴ *Ibid.* *Freeman v. Simpson*, 6 Sim. R. 75.

⁵ *Clarke v. Sewell*, 3 Atk. R. 99; *Shirt v. Westby*, 16 Ves. R. 393.

⁶ *Beckford v. Tobin*, 1 Ves. Sen. R. 310; *Crickett v. Dolby*, 3 Ves. R. 13; *Acherley v. Wheeler*, 1 P. Wms. R. 783; *Newman v. Bateson*, 3 Swanst. R. 689.

⁷ *Heath v. Perry*, 3 Atk. R. 101; *Tyrrell v. Tyrrell*, 4 Ves. R. 1; *Crickett v. Dolby*, 3 Ves. R. 10.

⁸ *Wynch v. Wynch*, 1 Cox, R. 433; *Harvey v. Harvey*, 2 P. Wms. R. 21; *Acherley v. Wheeler*, 1 P. Wms. R. 783; *Incedon v. Northcote*, 3 Atk. R. 369; *Chambers v. Goldwin*, 11 Ves. R. 2; *McDermott v. Kealy*, 3 Russ. Ch. R. 264, note; *Mills v. Robarts*, 1 Russ. & Myl. 555.

manifest intention on his part that they shall receive maintenance out of the legacy.¹ Where a legacy is given payable at a certain future time "with interest," interest will only begin to run after the lapse of a year from the testator's death.²

LIABILITIES OF EXECUTORS AND ADMINISTRATORS.

§ 275. In the first place, as to the liabilities of an executor or administrator, for the contracts and acts of the deceased. And in this respect the general rule is that the executor or administrator is liable in a suit upon any matter of contract, which could have been enforced against his testator or intestate.³ And this rule ordinarily obtains, whether the executor or administrator be named in the contract or not,⁴ and whether the contract be to pay a debt which is uncertain and sounds in damages.⁵ Yet if the contract be *personal* in its nature, and the performance by the deceased himself be the essence thereof, his executors will not be liable, unless the contract have been broken by the deceased during his lifetime.⁶ Thus, if an author contract to write a book, and before completing it, die, his executors will be discharged therefrom.⁷

¹ Ibid. *Leslie v. Leslie*, Cas. Temp. Sudg. 1; *Boddy v. Dawes*, 1 Keen, R. 362.

² *Knight v. Knight*, 2 Sim. & Stu. 490.

³ *Sollers v. Lawrence*, Willes, R. 421; 2 Williams on Ex'rs, Pt. 4, B. 11, ch. 1, § 1, p. 1224; Bac. Abr. Ex'rs, P. 1; Com. Dig. Adm'r, (B.) 14; *Mellen v. Baldwin*, 4 Mass. R. 480.

⁴ Went. Off. Ex'r, c. 11, p. 239, 243; *Hyde v. Skinner*, 2 P. Wms. R. 197; *Toller on Ex'rs*, 463; Co. Litt. 209, *u.*; *Quick v. Ludbarrow*, 3 Bulst. R. 30.

⁵ Bac. Abr. Ex'rs, (P.) 2; *Berisford v. Woodruff*, Cro. Jac. 404; *Clark v. Thomason*, Cro. Jac. 571; *Wilson v. Tucker*, 3 Stark. n. p. 6, 154; *Quick v. Ludbarrow*, 3 Bulst. R. 30.

⁶ *Hyde v. The Dean of Winsor*, Cro. Eliz. 553; *Marshall v. Broadhurst*, 1 Tyrw. R. 349; *Cooke v. Colcraft*, 2 W. Black. R. 856; *Baxter v. Burfield*, 2 Str. R. 1266; *Stebbins v. Palmer*, 1 Pick. R. 71.*

⁷ *Marshall v. Broadhurst*, 1 Tyrw. R. 349.

§ 276. Again, where the deceased has contracted jointly with others, the contract becomes chargeable only upon the survivors among the contractors, and not upon the executor of the deceased; unless he be the last of several joint contractors, in which case the executor of him who last dies, is solely chargeable.¹ But if the contract be joint and *several*, or several, the executor is liable if he be sued in a separate action, but he cannot be sued at law jointly with the other contractors.² In case of a partnership debt, which is a joint contract, however, executors may be sued in equity, though not in law,³ and the weight of opinion seems to be that a copartnership debt is also several, so as to give to a creditor a right to proceed against the executor, although the surviving partner be solvent;⁴ but this is doubtful. Yet if the surviving partner be insolvent, the executor undoubtedly would be liable.⁵

§ 277. Where a testator leaves an unexpired term of years, it vests in the executor, and he cannot ordinarily free himself therefrom without surrendering entirely his office.⁶ Yet he may do so, if the value of the premises is less than the rent, and there is a deficiency of assets, but while there are assets, he cannot renounce the term, but must hold it until they fail.⁷

¹ *Godson v. Good*, 2 Marsh. R. 300; s. c. 6 Taunt. R. 594; *Hammond v. Jethro*, 2 Brownl. R. 99; *Osborne v. Crosbern*, 1 Sid. R. 238; *Towers v. Moor*, 2 Vern. R. 99; *Calder v. Rutherford*, 3 Brod. & Bing. 302; *Foster v. Hooper*, 2 Mass. 572.

² *May v. Woodward*, Freem. R. 248; *Hall v. Huffam*, 2 Dev. R. 228.

³ *Vulliamy v. Noble*, 3 Meriv. R. 619.

⁴ *Devaynes v. Noble*, 1 Meriv. R. 530; s. c. 2 Russ. & Mylne, 495; *Sleech's case*, 1 Meriv. R. 539; *Wilkinson v. Henderson*, 1 Mylne & Keen, 582; 2 Williams on Executors, Pt. 4, B. 11, ch. 1, § 11, 1240.

⁵ *Ibid.*

⁶ *Billinghurst v. Spearman*, 1 Salk. R. 297; *Bolton v. Vanham*, Pollex. R. 125; s. c. 1 Vent. R. 271; Com. Dig. Administrator, (B.) 10.

⁷ Went. Off. Ex. c. 11, p. 244, c. 12, p. 290; *Wilkinson v. Cawood*, 3 Anstr. R. 909; *Reid v. Lord Tenterden*, 4 Tyrw. R. 118; 2 Williams on Executors, Pt. 4, B. 11, ch. 1, § 11, p. 1249.

If, however, the executor or administrator do *not enter* upon the demise, although he is bound to pay the rent as long as he has assets, he may plead *plene administravit* to an action therefor, if he have exhausted the assets, for he is liable as executor or administrator only in the *detinet*; ¹ but if he *enter* upon the demised premises, he becomes liable as assignee of the term, and may be sued by the lessor, either personally or in his representative character, and in such case he cannot plead *plene administravit*, even although he be sued as executor, and the judgment is *de bonis propriis*.² Yet if the land prove to be of less value than the rent, he may plead such fact specially, and pray judgment whether he shall be chargeable in any other capacity than that of executor.³ He will, nevertheless, be chargeable with so much rent as the premises are fairly worth.⁴ For all rent which has accrued during the life of the testator, the executor or administrator is only liable in his representative capacity, and not personally, and the judgment is *de bonis testatoris*.⁵

§ 278. Upon the death of the husband, no debts contracted by the wife while she was single, and remaining due at his death, survive against the executor and administrator;⁶ and if

¹ *Howse v. Webster*, Yelv. R. 103; *Helier v. Casebert*, 1 Lev. R. 127. But query whether this distinction between entry and non-entry in favor of the latter now obtains. See *Williams v. Bosanquet*, 1 Brod. & Bing. 238; *Nation v. Tozer*, 1 Crompt. Mees. & Rosc. 176.

² *Boulton v. Canon*, Freem. R. 337; *Jevens v. Harridge*, 1 Saund. R. 1, note (1); *Hope v. Bague*, 3 East, R. 2; *Helier v. Casebert*, 1 Lev. R. 127; *Lyddall v. Dunlap*, 1 Wils. R. 4; *Bailiff of Ipswich v. Martin*, Cro. Jac. 411.

³ *Billinghurst v. Speerman*, 1 Salk. R. 297; *Buckley v. Pirk*, 1 Salk. R. 317.

⁴ *Ibid.*

⁵ 1 Roll. Abr. 603, (s) pl. 9; *Fruen v. Porter*, 1 Sid. R. 379; 2 *Williams on Executors*, P. 4, B. 2, ch. 1, § 2, p. 1246.

⁶ 2 *Williams on Executors*, Pt. 4, B. 11, ch. 1, § 2, p. 1255; *Woodman v. Chapman*, 1 Camp. R. 189.

the wife die before the husband, he is not liable on her debts contracted while she was single, beyond her assets in his hands, as her executor or administrator.¹ But he is not liable on account of any fortune which he may have received with her.²

§ 279. An executor or administrator is never liable on the contracts of his testator or intestate beyond the assets that come to his hands, and any personal liability which he may incur, results from his own contract, as we shall see.

§ 280. Actions founded in tort, on which the deceased would have been personally liable, if living, do not, by the common law, survive against the executor or administrator.³ Yet, although the matter be founded in tort, if it be of such a nature that it can be treated as a breach of implied contract, the executor will be liable in an action on the contract.⁴ Thus, although trespass will not lie against the executor for a wrongful taking and detention of a horse by the deceased, yet the executor may be sued for the use and hire of the horse, treating the whole matter as one of implied contract.⁵ Again, actions on torts survive against the executor by statute, whenever the personal property of the deceased is thereby injured.⁶

§ 281. In the next place, as to the liability of an executor

¹ Ibid. Heard v. Stanford, Cas. Temp. Talb. 173; s. c. 3 P. Williams, R. 409.

² Went. Off. Ex. 369, (14th ed.).

³ Wheatley v. Lane, 1 Saund. R. 216, n. 1; Went. Off. Ex. 255; Anon. Dyer, R. 271 a; Hambley v. Trott, Cowp. R. 375; Perkinson v. Gilford, Cro. Car. 540; Pitts v. Hale, 3 Mass. R. 321; Mellen v. Baldwin, 4 Mass. R. 480; Wilbur v. Gilmore, 21 Pick. R. 250.

⁴ Hambley v. Trott, 1 Cowp. R. 375; Powell v. Layton, 2 Bos. & Pul. N. R. 370; Le Mason v. Dixon, W. Jones, R. 173.

⁵ Hambley v. Trott, Cowp. R. 375.

⁶ Stat. 4th ed. 3, c. 7; Jenney v. Jenney, 14 Mass. R. 231; Badlam v. Tucker, 1 Pick. 389; Holmes v. Moore, 5 Pick. R. 257.

or administrator upon his own contracts and acts. An executor or administrator is never liable on the contracts of the testator, as we have seen, beyond the assets which come to his hands. He may, however, after the death of the testator or intestate, make contracts, upon which he will render himself personally responsible, and these will now form a subject for consideration.

§ 282. If an executor make a contract, or promise *as executor*, and not on a new consideration, but on a consideration moving to the testator, he does not thereby render himself personally liable, but only liable in the character of executor, and judgment will only be given against him *de bonis testatoris*; and on a count alleging a promise "*as executor*," the executor will be no further charged than on a promise by the testator.¹

§ 283. But if the executor make a promise on a new consideration, not already existing, but moving to himself, he will be personally liable thereupon.² Thus, if he promise to pay a debt of the testator's, in consideration of forbearance of the creditor to institute a suit, he will render himself personally liable.³ So, also, if the executor promise to pay a debt of the testator at a *future day*, he makes the debt his own.⁴ So, also, money lent to the executor is a sufficient consideration to make him individually liable.⁵ But the mere possession of assets

¹ *Dowse v. Cox*, 3 Bing. R. 20; *Powell v. Graham*, 7 Taunt. R. 581; *Ashby v. Ashby*, 7 Barn. & Cres. 444; *Secar v. Atkinson*, 1 H. Black. R. 102.

² *Hamilton v. Incledon*, 4 Bro. P. C. 4; *Childs v. Monins*, 5 Moore, R. 282; *Reech v. Kennegal*, 1 Ves. Sen. R. 126.

³ *Johnson v. Whitchcott*, 1 Roll. Abr. 24, tit. Action Sur. le Case, (V.) pl. 33; *Chambers v. Leversage*, Cro. Eliz. 644; *Davis v. Reyner*, 2 Lev. R. 3; 1 Ventr. R. 120; *Deeks v. Strutt*, 5 T. R. 690; *Scott v. Stevens*, 1 Sid. R. 89; *Bradley v. Heath*, 3 Sim. 543; *Reech v. Kennegal*, 1 Ves. Sen. R. 126.

⁴ *Goring v. Goring*, Yelv. R. 11; *Bradley v. Heath*, 3 Sim. R. 543; *Childs v. Monins*, 2 Brod. & Bing. 460; *Reech v. Kennegal*, 1 Ves. Sen. R. 126.

⁵ *Rose v. Bowler*, 1 H. Black. R. 108; *Powell v. Graham*, 7 Taunt. R. 586.

does not seem to be a sufficient consideration.¹ And *a fortiori* a promise by an administrator or executor to pay the debt of the testator or intestate where there were no assets, would be *nudum pactum*.²

§ 284. It is enacted by the statute of frauds that "no action shall be brought whereby to charge an executor or administrator, upon any special promise, to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in *writing*, and *signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized."³ The memorandum required by this section of the statute of frauds, should set forth distinctly both the promise and the consideration, either in express terms, or by reference to something extrinsic, by which it may be rendered certain. It is not, however, necessary that the consideration should be stated expressly, provided there manifestly appear to be a sufficient consideration.⁴ Whether or not it was performed is a matter of evidence.⁵

¹ *Deeks v. Strutt*, 5 T. R. 690; *Rann v. Hughes*, 7 T. R. 350, n.; s. c. 4 Bro. P. C. 27. But see *Reech v. Kennegal*, 1 Ves. Sen. R. 126; *Truiman v. Howell*, Cro. Eliz. 91.

² *Pearson v. Henry*, 5 T. R. 6.

³ 29 Car. 2, c. 3, § 4.

⁴ The first case on this subject was *Wain v. Walters*, 5 East, R. 10, which was modified subsequently by the case of *Stapp v. Lill*, 1 Camp. R. 212, and 9 East, R. 348; *Lyon v. Lamb*, Fell on Merc. Guar. 318; *Morris v. Stacey*, Holt, N. P. R. 153; 2 Stark. Ev. 349; *Champion v. Plummer*, 4 Bos. & Pul. 252; *Wheeler v. Collier*, 1 Mood. & Malk. 125; *Boys v. Ayerst*, 6 Mad. 316. See also *Jenkins v. Reynolds*, 3 Brod. & Bing. 14; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Morley v. Boothby*, 3 Bing. 107; *Lees v. Whitcomb*, 5 Bing. 34; *Cole v. Dyer*, 1 Cr. & Jer. 461; *Newbury v. Armstrong*, 6 Bing. 201; *James v. Williams*, 3 Nev. & M. 196; 5 Barn. & Ad. 1109; *Laythorp v. Bryant*, 3 Scott, 250; *Sears v. Brink*, 3 Johns. 210; *Rogers v. Kneeland*, 13 Wend. 114; *Peltier v. Collins*, 3 Wend. 459. See also *Egerton v. Matthews*, 6 East, 308, and note (1). But see *Ex parte Gardom*, 15 Ves. 287, 288.

⁵ *Stapp v. Lill*, 1 Camp. R. 212; s. c. 9 East, R. 348.

§ 285. An executor, with assets, is answerable for the funeral expenses of the testator, although he do not order them, nor expressly promise to pay for them, for the law implies a promise to pay all reasonable funeral expenses, from the fact of his having assets.¹ Yet if the funeral be ordered by another person than the executor, to whom credit is given, the executor will not be liable.²

§ 286. If an executor submit a claim against himself as executor to arbitration, without protesting that the reference shall not be taken as an admission of assets, he thereby renders himself personally liable on the award, for the submission itself is otherwise treated as an admission that he has assets enough to pay, if it be decided that he is liable.³

§ 287. The trade of the deceased dies with him, and his executor or administrator cannot, without direction of court, carry it on, even though ordered to do so by the will, without incurring a personal responsibility on all contracts made by him in the course thereof.⁴ And, in this respect, the law is somewhat tyrannous, for while it throws upon the executor a personal responsibility, it denies to him any personal benefit from the trade. Within this rule, however, is not included the performance and completion of any unfinished executory contract made by the testator or intestate, which are not essentially personal, — such as a contract to build a house, or publish a work, when the building or publishing is already

¹ *Tugwell v. Heyman*, 3 Camp. R. 298; *Rogers v. Price*, 3 Younge & Jerv. 28.

² *Brice v. Wilson*, 3 Nev. & Man. 512; *Walker v. Taylor*, 6 Car. & Payne, 752.

³ *Riddell v. Sutton*, 5 Bing. R. 200; *Robson v. —*, 2 Rosc. R. 50; *Barry v. Rush*, 1 T. R. 691; *Pearson v. Henry*, 5 T. R. 7; *Worthington v. Barlow*, 7 T. R. 453.

⁴ *Barker v. Parker*, 1 T. R. 295; *Ex parte Garland*, 10 Ves. R. 119; *Ex parte Richardson*, 1 Buck. R. 209; *Wightman v. Townroe*, 1 Maule & Selw. 412.

commenced.¹ Again, the mere buying of particular articles by the executor for the purpose of furthering the sale of the testator's assets, such buying not being intended as an increase of stock for the purposes of trade, will not render the executor liable.²

§ 288. In respect to the payment of *general* legacies, the rule is, that the executor or administrator cannot be sued therefor in a court of law, although he expressly assent thereto, and promise to pay them.³ For the executor is first bound to pay the debts, and his liability to pay legacies depends upon whether there are sufficient assets remaining after payment of the debts.⁴ But in cases of *specific* legacies of goods and chattels, if the executor assent thereto, the property vests immediately in the legatee, and he may maintain an action therefor at law.⁵ And such assent may either be given expressly, or may arise by implication from the acts of the executor.⁶ But when it is once given, it cannot be recalled, and the legatee may take the legacy.⁷ In all cases of legacies, however, whether they be general or specific, and whether the executor have or have not assented thereto, he will be treated in a court

¹ *Marshall v. Broadhurst*, 1 C. & Jer. 403; *Edwards v. Grace*, 2 Mees. & Welsb. 190; *Dakin v. Cope*, 2 Russ. Ch. R. 170; *Garrett v. Noble*, 6 Sim. R. 104; *Siboni v. Kirkman*, 1 Mees. & Welsb. 418.

² 2 Will. on Executors, Pt. 4, B. 2, ch. 11, § 1, p. 1275; Toller on Executors, 487; Eden on Bank. 5.

³ In some of the States in the United States this rule does not obtain, and in some is altered by statute. See *Dewitt v. Schoonmaker*, 2 Johns. R. 243; *Beecker v. Beecker*, 7 Johns. R. 99; *Farwell v. Jacobs*, 4 Mass. R. 634; Rev. Stat. Mass. Pt. 2, ch. 66, § 16; *Pickering v. Pickering*, 6 N. Hamp. R. 120.

⁴ *Deeks v. Strutt*, 5 T. R. 690; *Jones v. Tanner*, 7 Barn. & Cres. 542; *Nicholson v. Sherman*, T. Raym. 23; 1 Story, Eq. Jur. § 591.

⁵ *Doe v. Guy*, 3 East, R. 120; *Paramore v. Yardley*, Plowd. R. 539; *Young v. Holmes*, 1 Strange, R. 70; 1 Story, Eq. Jur. § 591; *Williams v. Lee*, 3 Atk. R. 223.

⁶ 2 Williams on Executors, Pt. 3, B. 3, ch. 4, § 3, p. 981.

⁷ *Mead v. Lord Orrery*, 3 Atk. R. 238; *Doe v. Guy*, 3 East, R. 120.

of equity as a trustee for the legatee, and therein is relief properly obtainable against him.¹

§ 289. In the next place, an executor or administrator may become responsible on account of negligence or improper conduct in administering the estate; and in such case he is said to be guilty of a *devastavit*, or wasting of assets. For all maladministration or mismanagement of the estate, the executor or administrator is liable in a court of equity, and this is the proper tribunal for the adjustment of all difficulties arising from breaches of trust. Courts are, however, extremely liberal in respect to executors and administrators, and will not render them liable on slight and trivial grounds, although a proper performance of the trust will be insisted upon.² A *devastavit* may occur, not only through a direct and wilful misapplication of funds, but also by acts of negligence. If an executor or administrator collude with a purchaser to sell the testator's goods at an undervalue, or merely nominal price;³ or if he pay out legacies before debts; or pay the notes out of their legal order, having notice of all, and the assets prove to be deficient;⁴ or if he release or compound debts due to the testator, where it does not manifestly appear to have been done for the benefit of the estate;⁵ or, if he pay debts which he is not bound to pay;⁶ he will be guilty of a *devastavit*, and render

¹ 1 Story, Eq. Jur. § 593; *Franco v. Alvares*, 3 Atk. R. 346.

² *Powell v. Evans*, 5 Ves. R. 843; *Raphael v. Boehm*, 13 Ves. R. 410; *Tebbs v. Carpenter*, 1 Madd. R. 298.

³ *Worseley v. De Mattos*, 1 Burr. R. 475; 1 Story, Eq. Jur. § 422, 424, and cases cited; *Ewer v. Corbet*, 2 P. Williams, R. 148; *Went. Off. Executor*, 302; *Bac. Abr. Executor*, (L.) 1; *Holland v. Prior*, 1 Mylne & Keen, 240.

⁴ 2 Black. Comm. 511; *Rock v. Leighton*, 1 Salk. R. 310; 1 Saund. R. 333 a, n. 8; *Vernon v. Egmont*, 1 Bligh, N. s. 571; *Hawkins v. Day*, Ambl. 160; *Harman v. Harman*, 2 Shower, R. 492.

⁵ *Went. Off. Ex.* 303; *Cocke v. Jennor*, Hob. R. 66; *Brightman v. Keighley*, Cro. Eliz. 43; *Com. Dig. Adm'r*, (I); *Bac. Abr. Executors*, (L.) 1.

⁶ *Com. Dig. Adm'r*, (I.) 1; *Vez v. Emery*, 5 Ves. R. 141; *Doyle v. Blake*, 2 Sch. & Lef. 243; *Giles v. Dyson*, 1 Stark. N. P. C. 32.

himself personally responsible. Again, he is considered in equity,¹ (although this rule would not appear to obtain at law,) as a gratuitous bailee, and to be responsible, therefore, only for losses growing out of gross negligence or misconduct, and not for losses resulting from unavoidable accident or force, such as theft, or fire, or the like; or from reasonable confidence disappointed, or, indeed, from any cause not growing out of his gross negligence.² If he proceed to pay the legacies, after having paid all the debts of which he has any cognizance, and subsequently an outstanding debt appears, of which he had no notice, he will be protected in equity against it, in case of a deficiency of assets, if he have acted in good faith, and with due caution.³ And even in law, if he should pay a simple contract debt, without notice of a specialty debt, he would not be liable in case of a deficiency of assets, unless he appear to have been wanting in diligence and caution.⁴ But in courts of equity he will always be protected under circumstances of hardship or injustice, where he has been guilty of no improper or negligent conduct.⁵

§ 290. It is considered in equity as a breach of trust for an executor to lend money belonging to the estate upon any per-

¹ *Massey v. Banner*, 1 Jac. & Walk. 243; *Edwards v. Freeman*, 2 P. Wms. R. 447; 1 Story, Eq. Jur. § 90, and case cited; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Croft's Executors v. Lyndsey*, 2 Freem. R. 1.

² *Crosse v. Smith*, 7 East, R. 246; *Johnson v. Johnson*, 3 Bos. & Pul. 162, 169; *Jones v. Lewes*, 2 Ves. Sen. 240; *Brown v. Litton*, 1 P. Wms. R. 141; *Webster v. Spencer*, 3 Barn. & Ald. 360; *Clough v. Bond*, 3 Mylne & Craig, R. 490. See post, § 299, note.

³ 1 Story, Eq. Jur. § 90; *Edwards v. Freeman*, 2 P. Wms. R. 474; *Johnson v. Johnson*, 3 Bos. & Pul. 162, 169; *Hawkins v. Day*, Ambl. R. 160; *Chamberlain v. Chamberlain*, 2 Freem. R. 141. But see *Coppin v. Coppin*, 2 P. Wms. R. 296; *Orr v. Kaimes*, 2 Ves. Sen. R. 194; *Underwood v. Hatton*, 5 Beav. R. 36.

⁴ *Davis v. Monkhouse*, Fitzgib. R. 76; *Brooking v. Jennings*, 1 Mod. R. 174; *Britton v. Bathurst*, 3 Lev. R. 115; *Hawkins v. Day*, Ambl. R. 160.

⁵ 1 Story, Eq. Jur. § 90, and cases cited; *Clough v. Bond*, 3 Mylne & Craig, 490. See post, § 299, and note.

sonal security, such as a bond or promissory note, — for which he renders himself liable individually,¹ unless the will directs him to do so, in which case he is bound to exercise a sound discretion in lending to a responsible person.² But even then, executors cannot lend to each other,³ nor, apparently, will a loan avail against creditors.⁴

§ 291. Where there are two or more executors or administrators, one is not liable for the acts of the other, unless he have assented thereto, or have become involved therein and connected therewith by some act of his own.⁵ One executor is not, therefore, liable ordinarily for the assets which have come to the hands of his coexecutors,⁶ unless they have passed through his hands, and have been handed over to them by him without sufficient reason.⁷ But he cannot absolve himself from responsibility by paying over the assets to his coexecutors; he must show that they have been applied in conformity with the trusts of the will.⁸ So if one executor con-

¹ *Terry v. Terry*, Prec. Ch. 273; S. P. Gilb. Eq. R. 10; *Ryder v. Bickerton*, 3 Swanst. R. 80; *Walker v. Symonds*, 3 Swanst. R. 63; *Vigrass v. Binfield*, 3 Madd. R. 62; *Holmes v. Dring*, 2 Cox, R. 1.

² *Forbes v. Ross*, 2 Cox, R. 116.

³ *Stickney v. Sewell*, 1 Mylne & Craig, 8; *Gleadow v. Atkin*, 2 Crompt. & Jerv. 548; — *v. Walker*, 5 Russ. R. 7.

⁴ *Doyle v. Blake*, 2 Scho. & Lef. 231.

⁵ Went. Off. Executor, 306; *Anon. Dyer*, R. 210 a; *Hargthorpe v. Milforth*, Cro. Eliz. 318; *Langford v. Gascoyne*, 11 Ves. R. 335.

⁶ *Hargthorpe v. Melforth*, Cro. Eliz. 318; *Littlehales v. Gascoyne*, 3 Bro. Ch. R. 74; *Langford v. Gascoyne*, 11 Ves. R. 335.

⁷ *Edmonds v. Crenshaw*, 14 Peters, R. 166; *Townsend v. Barber*, Dick. R. 356; *Davis v. Spurling*, 1 Russ. & Mylne, 66; *Shipbrook v. Hinchinbrook*, 11 Ves. R. 254; 2 Story, Eq. Jur. § 1280 a.

⁸ *Edmonds v. Crenshaw*, 14 Peters, R. 166. In this case Mr. Justice M'Lean, delivering the opinion of the court, said: "Where there are two executors in a will, it is clear, that each has a right to receive the debts due to the estate, and all other assets, which shall come into his hands; and he is responsible for the assets he receives. This responsibility results from the right to receive, and the nature of the trust; and how can he discharge himself from this responsibility? In this case the defendant has attempted to discharge himself

tribute in any way to enable his coexecutor to obtain assets, he is ordinarily liable.¹ If, therefore, coexecutors agree with each other to divide their duties, and one to take charge of one part of the estate, and another of a different part, each will be responsible for the acts of the others.² But where an executor places assets in the hands of his coexecutor, he will not be chargeable, if he would have been authorized from the position and character of the coexecutor, to have placed them in his hands had he been a mere stranger.³ Thus, if the coexecutor be a banker, in perfectly solvent circumstances, or have been the confidential agent and attorney of the testator, the executor would not be liable for money placed in his hands.⁴ Again, if one executor passively allow his coexecutor to take assets without doing any act to further it, he will not be liable, at least in equity, unless he were bound to interfere and prevent it.⁵ But if he know that the funds are misapplied and he

from responsibility by paying over the assets received by him to his coexecutor. But such payment cannot discharge him. Having received the assets in his capacity of executor, he is bound to account for the same; and he must show, that he has made the investment required by the will, or in some other mode, and, in conformity with the trust, has applied the funds. One executor, having received funds, cannot exonerate himself, and shift the trust to his coexecutor, by paying over to him the sums received. Each executor has a right to receive the debts due to the estate, and discharge the debtors; but this rule does not apply as between the executors. They stand upon equal ground, having equal rights, and the same responsibilities. They are not liable to each other, but each is liable to the *cestui que trust*, to the full extent of the funds he receives. *Douglass v. Satterlee*, 11 Johns. 16; *Fairfax's Executors v. Fairfax*, 5 Cranch, 19."

¹ *Langford v. Gascoyne*, 11 Ves. R. 335; *Shipbrook v. Hinchinbrook*, 11 Ves. R. 254; 16 Ves. R. 477.

² *Gill v. Attorney-General*, Hardr. R. 314; *Lees v. Sanderson*, 4 Sim. R. 28; *Shipbrook v. Hinchinbrook*, 11 Ves. R. 252; 16 Ves. R. 477.

³ *Churchill v. Hobson*, 1 P. Williams, 241; *Chambers v. Minchin*, 7 Ves. R. 198.

⁴ *Chambers v. Minchin*, 7 Ves. R. 198; *Bacon v. Bacon*, 5 Ves. R. 331.

⁵ *Langford v. Gascoyne*, 11 Ves. R. 335; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Hovey v. Blakeman*, 4 Ves. R. 596. But the rule would seem to be different at law. See *Crosse v. Smith*, 7 East, R. 246.

does not interfere to prevent the misappropriation, he would be liable.¹

¹ *Williams v. Nixon*, 2 Beav. R. 472. In this case Lord Langdale said: "There can be no doubt, that, if an executor knows, that the moneys received by his coexecutor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing any thing on his part to procure the due execution of the trusts, he will, in respect of that negligence, be himself charged with the loss; but in cases of this kind it is always to be observed, that the testator himself, having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors; and in that character each has a separate right of receiving and of giving discharges for the property of the testator. In this particular case, the testator, having money in the funds, and other property to a considerable amount, directed certain annuities to be paid, and bequeathed his residuary estate in the mode stated. Both executors proved the will, and thereupon each of them became entitled to receive the property. One of them did receive the property — the dividends upon the stocks, and funds, and the other personal estate. If Mr. Nixon knew that his coexecutor was misapplying the moneys thus received, and acquiesced in it, he became himself liable; because he was a witness and an acquiescing party to the misapplication or breach of trust; but if he was not aware of the misapplication, I know of no case, in which the court has gone the length of saying, that an executor shall be held personally answerable for standing by and permitting his coexecutor to do that which, for any thing he knows to the contrary, was a performance of the trusts of the will. In this case it is clear Mr. Nixon must have known there was stock in the funds. He might have known, that the dividends, arising from that stock, were, from time to time, received by Mr. Mills; knowing that, he might, nevertheless, have full reason to believe, that they were duly applied, according to the trusts and directions of the will, in satisfaction of the annuities, or of the rent of the leasehold estate possessed by the testator at his death, and which was payable out of the whole estate. The argument for the plaintiffs proceeds upon this, that you are to impute to Mr. Nixon a knowledge of all, that he might have known. It is said, he proved the will, and must, therefore, have known its contents, and what was to be done in pursuance of the trusts; this is a presumption, which I think the law itself will draw, and he must, therefore, be taken to have known the contents of the will; then it is argued, that, on proving the will, he was bound to make a statement upon oath respecting the value of the property, and therefore became acquainted with the particulars. He might have had some knowledge of it, to the limited extent, which can be known on such occasions; but I cannot impute to him a knowledge of the exact state or amount of the property or of the claims upon it, or the clear amount of the balance in the hands of

§ 292. Where two executors have joined in signing a receipt, both will be liable thereon. But a distinction has been repeatedly made in favor of cases where the signing by one was merely a matter of form, he having no control over the money, or the money having been received beforehand by the other; and it would, therefore, seem, though this is by no means without doubt, that the question which tests the liability of an executor, who has joined his coexecutor in a receipt, is whether he gave the receipt as a mere form, or whether he had control over the money; in the former case he would not be liable, in the latter case he would be liable.¹ The cases are, however, in this respect, very contradictory, and the later cases have adhered to the strictest rule in considering receipts.²

his coexecutor. I certainly do not recollect any case, in which the principle has been carried to the extent, to which it has been here pressed; and if, in this case, I were to charge Mr. Nixon generally with all the assets received by his coexecutor, I must, in every other case, say, that an executor, who does not personally act, and who, having no reason to suspect any misapplication by his coexecutor, permits him to act alone, is liable for every misapplication committed by his coexecutor; I do not think I can lay down any such rule." *Clark v. Clark*, 8 Paige, R. 152.

¹ See *Churchill v. Hobson*, 1 P. Wms. R. 243; *Westly v. Clarke*, 1 Eden, R. 357; *Hovey v. Blakeman*, 4 Ves. R. 608; *Scurfield v. Howes*, 3 Bro. Ch. R. 95; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Doyle v. Blake*, 2 Sch. & Lef. 242; *Walker v. Symonds*, 3 Swanst. R. 64; *Sadler v. Hobbs*, 2 Bro. Ch. R. 117; 2 Story, Eq. Jur. § 1281.

² *Sadler v. Hobbs*, 2 Bro. Ch. R. 114; *Scurfield v. Howes*, 3 Bro. Ch. R. 94; *Chambers v. Minchin*, 7 Ves. R. 197; *Brice v. Stokes*, 11 Ves. R. 324; *Moses v. Levi*, 3 Younge & Coll. 359; *Shipbrook v. Lord Hinchinbrook*, 16 Ves. R. 477. But see *Monnell v. Monnell*, 5 Johns. Ch. R. 283; in which Chancellor Kent does not seem to admit any distinction between executors and trustees in respect to their receipts. So in *Westley v. Clarke*, (1 Eden, R. 357,) the strict doctrine was strongly assailed by Lord Northington, and in *Hovey v. Blakeman*, (4 Ves. R. 607,) Lord Alvanley contended against the conclusiveness of the rule, although he admitted it. But it is said by Mr. Justice Story (2 Eq. Jur. 1281, note,) to be "now established by what must be deemed overruling authority." See also *Manahan v. Gibbons*, 19 Johns. R. 427; *Sutherland v. Brush*, 7 Johns. Ch. R. 22, 23. See post, Receipts.

§ 293. Where an executor, after partially administering the estate, renounces his office, and surrenders the assets to his coexecutor, he is nevertheless liable for all the assets which he has received.¹ And if an executor has proved the will, he cannot afterwards renounce his office, so as to act in relation to the estate in a different character.² But if he have not proved the will, he may renounce his office, and may assist the executor without creating a personal liability.³

§ 294. Executors and administrators are chargeable with *interest on* the assets in their hands in two cases. 1st. Where they have been guilty of negligence in not accounting for the money, or in not investing it properly. Ordinarily, indeed, it is not their duty to invest funds belonging to the estate. Yet, if they be guilty of negligence in not accounting for the funds, or if they hold them for an unreasonable time in their hands, or if they keep money dead in their hands without apparent reason or necessity, they are chargeable with simple interest from the time when such funds should have been paid over, or invested.⁴ 2d. Where they have been guilty of a breach of trust, as by converting to their own personal use and profit, the money in their hands as executors or administrators.⁵ And

¹ Read *v.* Truelove, Ambl. R. 417; Doyle *v.* Blake, 2 Scho. & Lef. 231; Underwood *v.* Stevens, 1 Meriv. R. 712; Rogers *v.* Frank, 1 Younge & Jerv. 409; Edmonds *v.* Crenshaw, 14 Peters, R. 166; Douglass *v.* Satterlee, 11 Johns. R. 16.

² Graham *v.* Keble, 2 Daw. P. C. 17; Balchen *v.* Scott, 2 Ves. Jr. 678.

³ Orr *v.* Newton, 2 Cox, R. 274; Stacey *v.* Elph, 1 Mylne & Keen, 195; Dove *v.* Everard, 1 Russ. & Mylne, 231.

⁴ Dunscomb *v.* Dunscomb, 1 Johns. Ch. R. 510; Schieffelin *v.* Stuart, 1 Johns. Ch. R. 620; Boynton *v.* Dyer, 18 Pick. R. 7; Rocke *v.* Hart, 11 Ves. R. 59; Treves *v.* Townshend, 1 Bro. Ch. R. 384; De Peyster *v.* Clarkson, 2 Wend. R. 77; Wyman *v.* Hubbard, 13 Mass. R. 232.

⁵ Manning *v.* Manning, 1 Johns. Ch. R. 535; Ratcliffe *v.* Graves, 1 Vern. R. 196; Dunscomb *v.* Dunscomb, 1 Johns. Ch. R. 510; Piety *v.* Stace, 4 Ves. R. 620; Perkyne *v.* Baynton, 1 Bro. Ch. 375; Forbes *v.* Ross, 2 Bro. Ch. R. 430; Boynton *v.* Dyer, 18 Pick. R. 7.

in such cases they must pay the interest they make,¹ and in cases of gross breach of trust, they are chargeable with compound interest.²

§ 295. Executors may not only represent the testator, but they may be constituted trustees under the will, and their duties and liabilities in this character we shall now proceed to consider.

¹ Ibid. *Forbes v. Ross*, 2 Cox, R. 116; *Rocke v. Hart*, 11 Ves. 60; *Pocock v. Reddington*, 5 Ves. R. 794; *Piety v. Stace*, 4 Ves. R. 620.

² *Schieffelin v. Stewart*, 1 Johns. Ch. R. 620; *Dunscomb v. Dunscomb*, 1 Johns. Ch. R. 508; *Manning v. Manning*, 1 Johns. Ch. R. 535; *Boynton v. Dyer*, 18 Pick. R. 7; *Raphael v. Boehm*, 11 Ves. R. 92; s. c. 13 Ves. R. 407; *Stackpoole v. Stackpoole*, 4 Dow. R. 209; 2 Story, Eq. Jurisp. § 1277.

CHAPTER VI.

TRUSTEES.

§ 296. A TRUSTEE is a person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called a *cestui que trust*. Trusts are, therefore, equitable interests in property, based on confidence, over which courts of equity alone have full jurisdiction.¹ A trust may be created either by specialty or parol, and may be express or implied, but the statute of frauds of 29 Charles II. ch. 3, § 7, (which is generally adopted in the United States,) requires that it should be in writing. It is not necessary, however, that the declaration of trust should be made in any particular form, but it will be sufficient if it can be clearly extracted from any letters or writings of the party,² and although it be expressed in the form of a request, or desire, or recommendation.* If, however, a trust be so vague and indefinite, that its object and terms cannot clearly be ascertained, it will not be carried into effect.³ The statute also exempts trusts

¹ 2 Story, Eq. Jurisp. ch. 24, § 962; Cooper on Eq. Pl. Introd. p. 7; Sturt v. Mellish, 2 Atk. 610; Com. Dig. Chan. 2 (H.).

² 2 Story on Eq. Jurisp. § 973; Crook v. Brookeing, 2 Vern. R. 106; Inchinquin v. French, 1 Cox, R. 1; Smell v. Attersoll, 1 Russ. R. 266.

³ Stubbs v. Sargon, 2 Keen, R. 255; Ommanny v. Butcher, 1 Turn. & Russ. 260, 270.

arising, transferred, or extinguished by operation of law, and does not extend to declarations of trusts of personalty.¹

§ 296 *a*. This clause of the statute of frauds, however, is never so construed in equity as to afford a protection of fraud. And, where there has been an absolute deed, parol evidence is admissible to show an intended trust, and the omission or destruction of the defeasance by fraud or mistake.² So, also, the same rule obtains, where the defeasance is omitted by design upon a mutual confidence between the parties.³ So, also, where an estate is conveyed by an absolute deed to a party who is to act as agent, parol evidence is admissible to establish a resulting trust.⁴

¹ *Nab v. Nab*, 10 Mod. R. 404; *Fordyce v. Willis*, 3 Bro. Ch. R. 586; 2 Story, Eq. Jurisp. § 972.

² 4 Kent, Comm. p. 143; *Taylor v. Luther*, 2 Sumner, R. 228, 232; *Jenkins v. Eldredge*, 3 Story, R. 293.

³ *Ibid.* See also *Morris v. Nixon*, 1 Howard, S. C. R. 118; s. c. 17 Peters, S. C. R. 109.

⁴ *Jenkins v. Eldridge*, 3 Story, R. 288. In this case Mr. Justice Story says: "But here we are met with the objection, that no parol trust can be set up in opposition to the written documents; and that the conveyance of Deblois and the release of the plaintiff are inconsistent with any such trust. The answer has been already, in fact, given to this objection, by showing, that the trust is not inconsistent with the documents, or purposes for which they were given; but is in harmony with the *res gestæ*. But the court is pressed with authorities on this point, which certainly are of a cogent nature. One of them is *Bartlett v. Pickersgill*, 1 Eden, R. 515; s. c. 1 Cox, 15; 4 East, 577, n. But that is distinguishable as to the present point, although bearing on the point of agency, for all the consideration did not move from Eldredge for this purchase, in my view of the evidence, as it did in that case from the agent. The case of *Leman v. Whitley*, 4 Russ. R. 423, is far more difficult to answer. There the parol evidence to raise a trust was rejected, that evidence being offered to show, that a son conveyed to his father nominally as a purchaser for £400, but really as a trustee, in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the benefit of the son; and the Master of the Rolls (Sir John Leach) held, that the case was within the statute of frauds, and that it must, upon the documents, be treated as a

§ 297. A trustee is bound to perform all acts which are necessary for the proper execution of his trust. But by the English rule, as he is not allowed compensation for his ser-

purchase. That case is not *quatuor pedibus* with the present. But still it has a very strong, not to say stern bearing on it. I confess, that I have never felt satisfied with that decision, and should have great difficulty in following it, even if there were no authorities, which seemed fairly to present grounds for doubt. *Lees v. Nuttall*, 1 Russ. & Mylne, R. 53, which will presently be cited for another purpose, looks the other way. *Carter v. Palmer*, 11 Bligh, R. 397, 418, 419, in the House of Lords, although distinguishable in its circumstances, does certainly establish a principle, letting in parol evidence to establish a trust in a case of agency. But a very strong case is *Morris v. Nixon*, 17 Peters, R. 109; s. c. 1 How. R. 118, where a trust was actually enforced upon parol evidence by the Supreme Court of the United States, in contradiction to the answer of the defendant, and to the conveyance and documents passed between the parties; and in many particulars, it approaches very near to the present, for it grew out of an agency as to the premises. *Cripps v. Jee*, 4 Bro. Ch. R. 472, is equally strong to the same purpose. There was, indeed, slight written evidence leading to the conclusion, that there was a trust in that case, contrary to the written evidence (as there is in the present case); but the main evidence to show, that the conveyance, although absolute in form, was, in fact, a conveyance in trust to discharge incumbrances, with a resulting trust of the surplus for the grantor, was parol evidence; and upon the parol evidence the court established the trust. Indeed, the transaction in that case is in many respects the counterpart of the present.

"In the next place, as to the agency. It appears to me, that here a confidential relation of principal and agent did exist; and that being once shown, it disables the party from insisting upon the objection that the trust is void, as being by parol. The very confidential relation of principal and agent has been treated, as for this purpose, a case *sui generis*. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust, even when the agency itself may be, nay, must be proved only by parol. *Bartlett v. Pickersgill*, 1 Eden, R. 515; s. c. 1 Cox, R. 15; 4 East, R. 577, n., and *Leman v. Whitley*, 4 Russ. R. 423, are, I admit, against this doctrine,—not wholly, but to a limited extent; for the latter case excludes a case of fraud. But then *Lees v. Nuttall*, 1 Russ. & Mylne, R. 53, expressly decides, that if an agent, employed to purchase an estate, purchase for himself and on his own account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by parol, and the purchase was from a third person. *Carter v. Palmer*, 11 Bligh, R. 397, 418, 419, goes the full length of the same proposition."

vices, he would stand in the position of a gratuitous bailee, and be responsible only for losses or improper execution of his trust, in cases of gross negligence.¹ The rule denying him compensation does not, however, obtain generally in America,² and it is the general practice in America to allow commissions to trustees in cases of open and admitted trusts, where the trustee has not forfeited them by gross misconduct.³ It would

¹ 2 Story, Eq. Jurisp. 1268; Story on Bailments, § 173, 174; *Manning v. Manning*, 1 Johns. Ch. R. 527, and cases therein cited; *Chetham v. Lord Audley*, 4 Ves. R. 72; *Robinson v. Pett*, 3 P. Wms. R. 251; *Annesley's case*, Ambler, R. 78; *Brocksopp v. Barnes*, 5 Madd. R. 90; *Jenkins v. Eldredge*, 3 Story, R. 333.

² *Meacham v. Sternes*, 9 Paige, R. 399; *Barrell v. Joy*, 16 Mass. R. 221; *Jenkins v. Eldredge*, 3 Story, R. 333; *Denny v. Allen*, 1 Pick. R. 147. But see *Manning v. Manning*, 1 Johns. Ch. R. 527, where the English rule is maintained by Chancellor Kent. Mr. Justice Story, in commenting upon the rule as indicated by Mr. Chancellor Kent in the case of *Manning v. Manning*, and by Lord Cottenham in *Home v. Pringle*, 8 Clarke & Finelly, 264-287, says: "I confess, that I have not been able quite so clearly to see, or so strongly to approve, the policy of the rule. Trusts may be very properly considered as matters of honor and kindness, and of a conscientious desire to fulfil the wishes and objects of friends and relatives. But the duties and responsibilities of the office of a trustee are sufficiently onerous and perplexing in themselves; and mistakes, even of the most innocent nature, are sometimes visited with severe consequences. Nor can any one reasonably expect any trustee to devote his time or services to a very watchful care of the interests of others, when there is no remuneration for his services, and there must often be a positive loss to himself, in withdrawing from his own concerns some of his own valuable time. To say, that no one is obliged to take upon himself the duty of a trustee, is to evade, and not to answer, the objection. The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interest, to accept the office; and to take away the temptation to abuse the trust, for mere selfish purposes, as the only indemnity for services of an important and anxious nature. The very circumstance, that trustees now often stipulate for a compensation before accepting the office, and that courts of equity now sanction such an allowance, is a distinct proof, that the rule does not work well, and is felt to be inconvenient or unreasonable in practice. The rule to disallow compensation to trustees has not been generally adopted in America."

³ *Jenkins v. Eldredge*, 3 Story, R. 332, 333; *Dixon v. Homer*, 2 Metcalf, R. 420.

seem, that in all the States where a compensation is given, he would be a bailee for hire of labor and services, and bound to exercise ordinary diligence. And he engages that he has sufficient skill to execute the duties of his office properly. And, indeed, a trustee seems generally to be bound to take the same care of the trust-fund as a prudent and discreet man would take of his own property, to manage it for the best interest of the *cestui que trust*, and to make no profit or advantage out of it for himself personally.¹

§ 297 *a*. In regard to the preservation of trust property, the rule is, that a trustee must keep it with the same care as if it were his own. And if the trust property be lost or destroyed, or be stolen, he will not be responsible, unless the loss occur through the want of ordinary care and diligence.² He is even allowed in equity to establish any amount stolen from him by his own oath, where no other mode is practicable.³ So, also, if loss be incurred owing to the necessary or proper transmission of it through other hands; as if money be placed in the hands of a banker in good credit, to be remitted by a bill, drawn by a person in good credit, and the banker should become bankrupt, the trustee would not be responsible.⁴

§ 298. It is the duty of a trustee to keep regular accounts, to collect all debts, to defend all suits brought against the trust property, and to give notice of such suit to his *cestui que trust*; to keep himself properly informed in respect to all circum-

¹ *Boynton v. Dyer*, 18 Pick. R. 6, and cases cited; *The Charitable Corp. v. Sutton*, 2 Atk. R. 406; *Clough v. Bond*, 3 Mylne & Craig, 490; 2 Story, Eq. Jurisp. § 465, § 1269, and cases cited; *Hart v. Ten Eyck*, 2 Johns. Ch. 76; *Thompson v. Brown*, 4 Johns. Ch. R. 619; *Caffrey v. Darby*, 6 Ves. R. 488; *Wilkinson v. Stafford*, 1 Ves. Sen. R. 32, 41.

² 2 Story, Eq. Jurisp. § 1269; *Morley v. Morley*, 2 Chan. Cas. 2; *Knight v. Lord Plimouth*, 3 Atk. R. 480; *Jones v. Lewis*, 2 Ves. Sen. R. 240.

³ *Ibid*.

⁴ *Ibid*. *Ex parte Belchier v. Parsons*, Ambl. R. 219; *Knight v. Lord Plimouth*, 3 Atk. R. 480; *Clough v. Bond*, 2 Mylne & Craig, 490.

stances affecting the trust property, and to use reasonable diligence in executing his trust.¹ He will not be liable, if he have not been guilty of more than ordinary negligence, for loss by inevitable accident or force, such as losses by fire or robbery,² and he will be allowed to establish the amount lost by his own oath.³ Again, inasmuch as trustees stand in a fiduciary relation to their *cestui que trust*, they are not permitted to accept of his bounty, nor to purchase the trust property from him;⁴ and the reason of this rule is, that the position of the trustee enables him to exercise a commanding influence over his *cestui que trust*, and affords opportunities for fraudulent or excessive advantage. Yet, although, ordinarily, no purchases by a trustee from his *cestui que trust* are binding, yet, if the sale be made with the most entire good faith and openness, and with no circumstances indicating the least advantage taken by the trustee, such sales will be permitted to stand, if the *cestui que trust* desire it.⁵ But even in a case of a purchase of trust property without suspicion, the *cestui que trust* may claim to have it set aside.⁶ If there be any inequality or inadequacy

¹ Freeman v. Fairlie, 3 Meriv. R. 29, 41; Pearse v. Green, 1 Jac. & Walk. 135, 140; Adams v. Clifton, 1 Russ. R. 297; Walker v. Symonds, 3 Swanst. R. 58, 73; Boynton v. Dyer, 18 Pick. R. 6; 1 Story, Eq. Jurisp. § 465, 1275; Caffrey v. Darby, 6 Ves. R. 488.

² 2 Story, Eq. Jurisp. § 1269; Ex parte Belchier v. Parsons, Ambl. R. 219.

³ Morley v. Morley, 2 Ch. Cas. 2; Knight v. Lord Plimouth, 3 Atk. R. 480; Jones v. Lewis, 2 Ves. R. 240.

⁴ 1 Story, Eq. Jurisp. § 311, 321; Hatch v. Hatch, 9 Ves. R. 297; Hylton v. Hylton, 2 Ves. R. 548; Farnum v. Brooks, 9 Pick. R. 212; Bulkley v. Wilford, 2 Clark & Fin. 102, 177; Arnold v. Brown, 24 Pick. R. 89, 96.

⁵ 1 Story, Eq. Jurisp. § 321, and cases cited; Beeson v. Beeson, 9 Barr, R. 279; Painter v. Henderson, 7 Barr, R. 48; Jenkins v. Eldredge, 3 Story, R. 290.

⁶ Davoue v. Fanning, 2 Johns. Ch. R. 252; Campbell v. Walker, 5 Ves. R. 678; Ex parte Lacey, 6 Ves. R. 625; Ex parte Bennett, 10 Ves. R. 381; Whitcomb v. Minchin, 5 Madd. R. 91; Cane v. Lord Allen, 2 Dow. R. 289, 299; Edwards v. Meyrick, 2 Hare, R. 60; 1 Story, Eq. Jurisp. § 311. In the case of a sale by a client to an attorney, the attorney must prove the entire

of price, *à fortiori*, the sale would not be binding. And the mere fact that a trustee sells property, bought by him of his *cestui que trust*, for a larger price than he gave for it, would make him a trustee for the overplus.¹ But when a *cestui que trust*, knowing of a purchase of the trust property by his trustee, and of his own right to avoid it, assents to the application of the purchase-money to his own use, such an assent will operate as a ratification of the sale.²

§ 299. But besides these general rules, there are some special acts, in relation to which courts of equity have enlarged the liabilities of a trustee and required a stricter measure of diligence. Thus, it is the duty of a trustee to invest the funds of his *cestui que trust*, and not to keep them dead in his hands; and if he suffer money belonging to his *cestui que trust* to remain idle and unproductive, for an unreasonable length of time, he will be chargeable with simple interest thereon, and in case of gross delinquency, with compound interest.³ Yet a trustee cannot be surcharged upon evidence of witnesses, that the property ought to have yielded more than it did, when there is no evidence as to particulars, and there is evidence that the rents demanded were at fair prices, and every thing received had been accounted for, and the property very much

absence of any advantage taken of the client, and then the sale will be good and binding. *Hunter v. Atkyns*, 3 Mylne & Keen, 113; 1 Story, Eq. Jurisp. § 312; *Cane v. Lord Allen*, 2 Dow. R. 289; *McKinley v. Irvine*, 13 Ala. R. 681.

¹ *Fox v. Mackreth*, 2 Brown, Ch. R. 400; *Prevost v. Gratz*, 1 Peters, C. C. R. 367; s. c. 6 Wheat. R. 481; *Edwards v. Meyrick*, 2 Hare, R. 60; *Hawley v. Cramer*, 4 Cowen, R. 717; *Slade v. Van Vechten*, 11 Paige, R. 21.

² *Beeson v. Beeson*, 9 Barr, R. 279.

³ 2 Kent, Comm. Lect. 30, p. 230, and cases cited; *Boynnton v. Dyer*, 18 Pick. R. 7; *Raphael v. Boehm*, 11 Ves. R. 92; *Green v. Winter*, 1 Johns. Ch. R. 26; *Dunscomb v. Dunscomb*, 1 Johns. Ch. R. 508; *Phillips v. Phillips*, 2 Freem. Ch. Cas. 11; 2 Story, Eq. Jurisp. § 1277; *Wright v. Wright*, 2 McCord, S. C. Ch. R. 185; Rev. Stat. of New Jersey, 779, § 11; *Everston v. Tappan*, 5 Johns. Ch. R. 497.

improved under his management.¹ But in investing the property in his hands as trustee, he is bound to exercise the strictest circumspection and caution, and if he put it in the control of persons, who ought not to be intrusted with it, or if he invest it in stock, in which a court of equity is not accustomed to direct funds in its possession as trustee to be invested, the trustee would be liable for any loss or depreciation in value, although he may have acted in entire good faith.² But where he acts within the strict line of his duty, and does what a court of equity would order, under similar circumstances, he will not be liable.³ If, therefore, he deposit money in the hands of

¹ Moore's Appeal, 10 Barr, R. 435.

² Clough v. Bond, 3 Mylne & Craig, 490, 496; Hancorn v. Allen, 2 Dick. R. 498; Trafford v. Boehm, 3 Atk. R. 444; Adye v. Feuillateau, Dick. R. 499, note; s. c. 1 Cox, R. 24; Jackson v. Jackson, 1 Atk. R. 513; Knight v. Earl of Plimouth, 1 Dick. R. 126; Fyler v. Fyler, 3 Beav. R. 550; Holland v. Hughes, 16 Ves. R. 111.

³ Clough v. Bond, 3 Mylne & Craig, 490. In this case Lord Cottenham, speaking of the personal representatives of a deceased person, who are treated as trustees, says: "It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund, in which any part of the estate may be invested, or for the insolvency or misconduct of any person, who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons, who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property, when it ought to be sold, and it be afterwards lost without any fault of his, he is liable; Phillips v. Phillips, (2 Freem. Ch. Cas. 11); or if he leave money due upon personal security, which, though good at the time, afterwards fails. Powell v. Evans, (5 Ves. 839); Tebbs v. Carpenter, (1 Madd. 290). And the case is stronger, if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus, he is not liable upon a proper investment in the three per cents., for a loss occasioned by the fluctuations of that fund; Peat v. Crane, (2 Dick. 499, note), but he is for the fluctuations of any unauthor-

a banker in good credit, who afterwards fails, he would not be responsible.¹ The same doctrine obtains where he is forced to do an act from necessity.²

§ 300. Again, a trustee is not permitted to invest the property of his *cestui que trust* solely in *personal* securities of any kind; nor can he allow any debt, which comes to his possession, to stand upon the personal credit of the debtor.³ He is, therefore, bound to take security on real estate, or something of permanent value, or to act under the direction of a court of equity, which he may always claim.⁴

§ 300 *a*. Such, undoubtedly, are the rules; which are held in the English courts of equity to govern the duties of a trustee in investing the property of his *cestui que trust*.⁵ A more limited doctrine was at one time advanced by Lord Northing-

ized fund; *Hancom v. Allen*, (2 Dick. 498); *Howe v. Earl of Dartmouth*, (7 Ves. 137, see p. 150). So, when the loss arises from the dishonesty or failure of any one, to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a coexecutor or coadministrator. *Langford v. Gascoyne*, (11 Ves. 333); *Lord Shipbrook v. Lord Hinchinbrook*, (11 Ves. 252; 16 Ves. 477); *Underwood v. Stevens*, (1 Mer. 712). And see *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 Younge & Coll. New R. 16, 28."

¹ *Knight v. Lord Plimouth*, 3 Atk. R. 480; *Jones v. Lewis*, 2 Ves. R. 240; *Rowth v. Howell*, 3 Ves. R. 565; *Massey v. Banner*, 4 Madd. R. 416; *Adams v. Claxton*, 6 Ves. R. 226.

² *Ex parte Belchier v. Parsons*, Ambl. 219; 2 Story, Eq. Jurisp. § 1269.

³ *Powell v. Evans*, 5 Ves. R. 839; *Tebbs v. Carpenter*, 1 Madd. R. 290; *Adye v. Feuillateau*, 1 Cox, R. 24; *Ryder v. Bickerton*, 3 Swanst. R. 80; *Walker v. Symonds*, 3 Swanst. R. 62; *Holmes v. Dring*, 2 Cox, R. 1, 2; *Wilkes v. Steward*, Coop. R. 6; 2 Story, Eq. Jurisp. § 1274.

⁴ *Ibid.* *Leech v. Leech*, 1 Ch. Cas. 249; 1 Story, Eq. Jurisp. § 1276, note (1). See *Lovell v. Minot*, 20 Pick. R. 116.

⁵ *Holmes v. Dring*, 2 Cox, R. 1, 2; *Adye v. Feuillateau*, 1 Cox, R. 24; *Ryder v. Bickerton*, 3 Swanst. R. 80; 1 Eden, R. 149, and Mr. Eden's note, p. 150; 2 Story, Eq. Jurisp. § 1274.

ton, who declared, that a letting of money on personal security did not, of itself, constitute gross negligence and breach of trust, but that other circumstances must be shown in order to charge the trustee.¹ This doctrine, however, did not meet with favor, and has been since wholly denied in the English cases.² It would seem, however, to have been adopted in this country as the most proper and reasonable rule;³ for, as has been said by Mr. Justice Story, that "to add hazard and risk to trouble and to subject a trustee to loss which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office."⁴ It has been directly held in the Supreme Court of Massachusetts, that a loan by a guardian, upon the promissory note of the borrower, payable in one year with interest, and secured by a pledge of shares in a manufacturing corporation, the amount of the loan being about three quarters of the par value of the shares, and less than three quarters of their market value, was an investment made with sound discretion; and although the borrower failed before the note became due, and the shares fell in value below the amount of the note, the guardian was held not to be responsible for the loss.⁵ Mr. Chief Justice Shaw, in this case, re-asserts the rule declared in a previous case, "that all that can be required in such cases is, that the trustee shall conduct himself faithfully, and exercise a sound discretion."⁶

¹ *Harden v. Parsons*, 1 Eden, R. 148.

² *Wilkes v. Steward*, Cooper, R. 6; *Walker v. Symonds*, 3 Swanst. R. 62. See also *Lowson v. Copeland*, 2 Bro. Ch. R. 156, and Mr. Bell's note.

³ *Harvard College v. Amory*, 9 Pick. R. 461; *Lovell v. Minot*, 20 Pick. R. 116, 119; *Case of Calhoun's Estate*, 6 Watts, R. 185; *Thompson v. Brown*, 4 Johns. Ch. R. 628; *Jones's Appeal*, 8 Watts & Serg. 143; *Hext v. Porcher*, 1 Strobb. Eq. R. 170; *Twaddle's Appeal*, 5 Bar. R. 15.

⁴ 2 Story, Eq. Jurisp. § 1271.

⁵ *Lovell v. Minot*, 20 Pick. R. 119.

⁶ *Harvard College v. Amory*, 9 Pick. R. 461. See also *Smith v. Smith*, 4 Johns. Ch. R. 281, 441, where Mr. Chancellor Kent seems to adopt the same rule.

§ 300 *b*. Again, where a trustee places money belonging to his *cestui que trust* in the hands of a banker, he must be careful to distinguish the fund from his own property, and to keep a separate account thereof, or he will be held liable in case of the failure of the banker.¹ Where, therefore, a guardian, on the day of the receipt of money belonging to his ward, deposited it in his own name in a banking institution then in good credit, but which subsequently failed, and took a certificate thereof, payable to himself or bearer; it was held, that the loss fell upon him, although on the day of deposit, by indorsement on the certificate, he declared it to be the property of his ward, and placed in bank for his benefit.²

§ 301. But, where special directions are given as to the duties of trustees in the instrument creating the trust, they will override the rules of equity, and form the guide and exposition of the duties of the trustee; and it is only in cases where a trustee acts without special directions, that he will be bound by the strict rules stated above.

§ 302. Where a trustee commits a breach of trust, wilfully, he is personally liable to make good any injury resulting therefrom to his *cestui que trust*. If, therefore, he sell the trust property improperly, and receive payment therefor, although he can pass the title to a *bonâ fide* purchaser for a valuable consideration, he will be personally responsible; and if he should afterwards come into possession of the same property, the trust would revive and attach to it again.³ So, also, the same rule obtains where he misapplies the money, or invests

¹ *Massey v. Banner*, 4 Madd. Ch. R. 413; *Freeman v. Fairlie*, 3 Meriv. R. 29.

² *Jenkins v. Walter*, 8 Gill & Johns. R. 218.

³ 2 Story, Eq. Jurisp. § 1264; *Pocock v. Reddington*, 5 Ves. R. 800; *Harrison v. Harrison*, 2 Atk. 121; *Bostock v. Blakeney*, 2 Bro. Ch. R. 653; *Forrest v. Elwes*, 4 Ves. 497; *Earl Powlet v. Herbert*, 1 Ves. Jr. R. 297; *Byrchell v. Bradford*, 6 Madd. R. 235.

it in improper securities;¹ and if he make use of it for his private advantage and profit, he will be responsible for all the profit made thereon.² Wherever there is a breach of trust, the debt is treated as a simple contract debt, and is only binding upon personal assets of the trustee, even in cases of fraud, unless there be some acknowledgment of the debt, under seal, by the trustee.³ But courts of equity, in such cases, will so marshal the debts, that if the personal assets be exhausted by specialty creditors, the simple contract creditors will take their place, and receive satisfaction out of the real estate.⁴

§ 303. Courts of equity will also remove trustees, and appoint others where the circumstances of the case demand such an act;⁵ and wherever there is a failure of suitable trustees to perform the trust, however it may occur, courts of equity will appoint new trustees.⁶ Trustees are generally removed by proceedings instituted for that purpose; but cases may occur in which a trustee might be removed, though the bill was filed for a different purpose.⁷

§ 303 *a*. Where funds are placed in the hands of a trustee for accumulation, in trust for a minor, to be held until such minor arrives at full age, he would be justified in appropriating the interest, and if necessary even the principal to the

¹ *Ibid.* *Steele v. Babcock*, 1 Hill, N. Y. R. 527; *Estate of Evans*, 2 Ashmead, R. 470.

² *Fawcett v. Whitehouse*, 1 Russ. & Mylne, 132; *Docker v. Somes*, 2 Mylne & Keen, 664; *Wedderburn v. Wedderburn*, 4 Mylne & Craig, 41; 1 Story, Eq. Jurisp. § 465; *Saegar v. Wilson*, 4 Watts & Serg. R. 501.

³ *Bartlett v. Hodgson*, 1 T. R. 42; *Vernon v. Vawdry*, 2 Atk. R. 119; 1 Story, Eq. Jurisp. § 1285, 1286.

⁴ *Cox v. Bateman*, 2 Ves. 18.

⁵ *Jouncey v. Rutherford*, 9 Paige, R. 273; *Ellison v. Ellison*, 6 Ves. R. 664; *Millard v. Eyre*, 2 Ves. Jr. 94; *Buchanan v. Hamilton*, 5 Ves. R. 722.

⁶ *Ibid.* *Ellison v. Ellison*, 6 Ves. R. 663; 2 Story, Eq. Jurisp. § 1287; *Lake v. De Lambert*, 4 Ves. R. 592.

⁷ *Comegys v. The State*, 10 Gill & Johns. 175.

maintenance and education of the *cestui que trust*, where there is no other property adequate for their purposes, and where the minor is of tender age, without living parent, there being no devise over and no third person interested in the fund.¹ And indeed where a trustee expends the interest or principal of an accumulating fund under circumstances that would induce a chancellor to make a decree for such a use, the court will allow him, in the settlement of his accounts, credit for such expenditures, in like manner as if a previous order had been given.²

§ 304. Where there are several trustees, one is not responsible for the acts of the others, of which he has no cognizance, or which he has not coöperated in or connived at.³ And if one of several trustees sign a receipt jointly with the others, this mere fact alone will only render him liable for money which he has received.⁴ And in this respect, the liability of a trustee is distinguished from that of an executor, the latter being ordinarily liable for the money received by his coexecutor if he join with him in a receipt;⁵ and this distinction in favor of the trustee obtains upon the ground, that, as he is bound to join with his cotrustee in a receipt, the act is not a voluntary one, and ought not to bind him. Yet if a joint receipt be given, and it do not appear from the instrument itself, and cannot be clearly proved how much was received by one trustee, and how much by the other, each will be charged with the whole, the liability being the same as if the parties had

¹ Petition of Chas. Potts, 1 Ashmead, R. 340.

² Ibid.

³ 2 Story, Eq. Jurisp. § 1280.

⁴ Ibid. § 1281; *Fellows v. Mitchell*, 1 P. Wms. R. 83, and Cox's note; *Churchill v. Hobson*, 1 P. Wms. R. 241; *Westley v. Clarke*, 1 Eden, R. 360; *Monell v. Monell*, 5 Johns. Ch. R. 283.

⁵ Ante, § 291; 2 Story, Eq. Jurisp. 1280 *a*; *Sadler v. Hobbs*, 2 Bro. Ch. R. 114; *Moses v. Levi*, 3 Younge & Coll. 359, 367; *Chambers v. Minchin*, 7 Ves. R. 197; *Brice v. Stokes*, 11 Ves. R. 324; *Shipbrook v. Hinchinbrook*, 16 Ves. R. 477.

mixed up their personal account with their account as trustees.¹ Again, if the trustee have improperly suffered his cotrustee to retain property for a long time without proper security; or if he connive at or assent to any improper act by his cotrustee; or if he agree with his cotrustee, that the latter shall transact exclusively a certain part of the duty; or if he pay over to his cotrustee any funds which he may receive, he will be jointly liable.² But when a trustee becomes a purchaser at a sale by a cotrustee, it is necessary, in order to render the sale utterly void by reason of the fraudulent acts of the seller, to connect the purchaser with them.³

¹ *Fellows v. Mitchell*, 1 P. Wms. R. 83; s. c. 2 Vern. R. 504; 2 Story, Eq. Jurisp. §1282; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 108; *Mumford v. Murray*, 6 Johns. Ch. R. 1, 16.

² *Gill v. Attorney-General*, Hard. R. 314; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *Sadler v. Hobbs*, 2 Bro. Ch. 116; *Keble v. Thompson*, 3 Bro. Ch. R. 112; *Langston v. Ollivant*, Coop. R. 33; *Caffrey v. Darby*, 6 Ves. R. 488; *Oliver v. Court*, 8 Price, R. 127; *Mumford v. Murray*, 6 Johns. Ch. R. 14; *Bate v. Scales*, 14 Ves. R. 402.

Beeson v. Beeson, 9 Barr, R. 279.

CHAPTER VII.

GUARDIAN AND WARD.

§ 305. THE same general principles that apply to trustees govern the relation of guardian and ward. During the existence of the relation, a general inability to contract with each other is imposed upon them.¹ No sale therefore by the ward to the guardian will be binding, while such relation continues; and even transactions, entered into between them after the connection is dissolved, will be closely scrutinized in equity, and unless they be in the most entire good faith, and without any undue influence, or advantage taken of the ward, will be set aside; for the antecedent relationship will, in case of undue advantage, be considered as operating as an improper influence upon the bargain.² But after the relationship has been entirely dissolved, and the accounts all settled after the coming of age of the ward, and sufficient time has elapsed to place the parties in complete independence of each other, so that they deal with each other as strangers, their transactions

¹ 1 Story, Eq. Jur. § 317; *Dawson v. Massey*, 1 Ball & Beat. R. 226.

² *Ibid.* *Dawson v. Massey*, 1 Ball & Beat. 229; *Wright v. Proud*, 13 Ves. R. 136; *Wedderburn v. Wedderburn*, 4 Mylne & Craig, 41; *Hylton v. Hylton*, 2 Ves. R. 548; *Wood v. Downes*, 18 Ves. R. 126; 2 Kent, Comm. Lect. 30, p. 230; *Hatch v. Hatch*, 9 Ves. R. 297. See *Archer v. Hudson*, 7 Beavan, R. 551; *Gale v. Wells*, 12 Barbour, R. 84.

will be binding.¹ And, although the rule is that a guardian is not entitled to claim any remuneration or compensation for his services beyond his expenses and outlay;² nor for services before his appointment;³ yet after the complete dissolution of the relation, where parties act in entire independence of each other, any bounty or gift by the ward will be good, and will be considered as the performance of a moral duty.⁴

§ 306. In respect to the management of the ward's property in the hands of the guardian, he is a mere trustee. Ordinarily, he cannot change the investment of the property of his ward, whatever it may be, and he is bound to exercise ordinary skill and diligence and sagacity in investing the money which comes to his hands. If, therefore, he suffer money to lie idle and unproductive for an unreasonable length

¹ Dawson v. Massey, 1 Ball & Beat. 229, 232; Aylward v. Kearney, 2 Ball & Beat. 463; Hylton v. Hylton, 2 Ves. R. 517; 1 Story on Eq. Jur. § 320.

² Ante, § 297, 298, Trustees. This is the general rule, but it has been altered by statute in some of the States in this country. N. Y. R. Stat. Vol. 2, p. 153, § 20, 21; Mass. Rev. Stat. pt. 2, tit. 7, ch. 79.

³ Clowes v. Van Antwerp, 4 Barbour, R. 416.

⁴ Ibid. Lord Eldon in Hatch v. Hatch, 9 Ves. R. 297, thus expresses himself on this subject:—"There may not be," says he, "a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than, if a trustee having done his duty, the *cestui que trust*, taking into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, except quite satisfied, that the act is of that nature, for the reason often given; and recollecting, that in discussing, whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a court of justice; that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind, misled by undue kindness, or forced by oppression; and the difficulty of getting property out of the hands of the guardian or trustee thus increased. And, therefore, if the court does not watch these transactions with a jealousy, almost invincible, in a great majority of cases, it will lend its assistance to fraud, where the connection is not dissolved, the account not settled, every thing remaining pressing upon the mind of the party under the care of the guardian or trustee."

of time, or if he mingle it with his own funds so that the two funds cannot be distinguished, he is liable for simple interest; and if he have been guilty of gross negligence or misconduct, he will be chargeable under some circumstances *with compound interest*, the court ordering that rests shall be made in making up his accounts, and the interest at each rest charged as principal.¹ If, however, he change the investment of property belonging to his ward, in good faith, and for the presumed advantage of the latter, it will be good, if it be such as a court of equity would order.² Again, he is bound to lease the lands of his ward, although he cannot sell them; but if he lease them for a term extending beyond the age when his ward attains majority, the latter may avoid the lease.³

§ 306 *a.* So, also, he is bound to keep separate accounts in respect to his ward, and to distinguish all property belonging to the latter from his own, and to deposit money which he held as guardian in the ward's name; or in case of loss, he will render himself personally liable therefor.⁴

§ 307. Again, a guardian cannot apply the property of the

¹ 2 Kent, Comm. Lect. 30, p. 230; *Wright v. Wright*, 2 M'Cord, Ch. R. 185; *Ringold v. Ringold*, 1 Harr. & Gill, R. 11; *Raphael v. Boehm*, 11 Ves. R. 92; *Schieffelin v. Stewart*, 1 Johns. Ch. R. 620; *Ex parte Baker*, 18 Ves. R. 246. In New Jersey, guardians are chargeable with 10 per cent. interest, when they are guilty of negligence or fault in not placing their ward's money at interest. See also *Revett v. Hawey*, 1 Sim. & Stu. 502; *Docker v. Sones*, 2 Mylne & Keen, 665.

² 2 Kent, Comm. Lect. 30, p. 230; 2 Story, Eq. Jur. § 1357; *Inwood v. Twyne*, Ambl. R. 418; *Pierson v. Shore*, 1 Atk. R. 480; *Ashburton v. Ashburton*, 6 Ves. R. 6; *Dorsey v. Gilbert*, 11 Gill & Johns. 87.

³ *Genet v. Tallmadge*, 1 Johns. Ch. R. 561; *Jones v. Ward*, 10 Yerg. R. 160; *Roe v. Hodgson*, 2 Wils. R. 129; *Field v. Schieffelin*, 7 Johns. Ch. R. 154; *Snook v. Sutton*, 5 Halst. R. 133.

⁴ *Stanley's Appeal*, 8 Barr, R. 431; *Jenkins v. Walter*, 8 Gill & Johns. 218; *Massey v. Banner*, 4 Madd. Ch. R. 416; *Tremain v. Fairlie*, 3 Meriv. R. 29; *Ante*, § 300 *b.* *Worrell's Appeal*, 9 Barr, 508.

ward to his own use and profit. And if he attempt to do so, all the profit which he makes will enure to the benefit of his ward.¹ All his acts relating to the property of his ward are acts of agency for which he is bound to account. And if he commit waste, or be guilty of wilful misconduct, or be wanting in ordinary diligence, he will be responsible for the loss.² But if he use ordinary diligence in the preservation of the property intrusted to him, he will not be liable for losses occasioned by irresistible force or inevitable accident, such as losses by fire or robbery.³

¹ 2 Kent, Comm. Lect. 30, p. 229; *Fawcett v. Whitehouse*, 1 Russ. & Mylne, 132; Ante, Trustees, § 297, 298, and cases cited. *Petition of Getts*, 2 Ashmead, R. 441.

² Ibid. 1 Story, Eq. Jur. § 90, 1269; *Ex parte Belchier v. Parsons*, Ambl. R. 218; *Crosse v. Smith*, 7 East, R. 246; *Massey v. Banner*, 1 Jac. & Walk. 243.

³ Ibid.

CHAPTER VIII.

CORPORATIONS.

§ 308. CORPORATIONS are, in the United States, created by the legislature, and in England, by the royal charter and act of parliament. They may also arise by prescription. There are, in this country, certain corporations, created originally by charter, previous to the revolution, but these have been recognized and adopted either impliedly, or by the express provision in the constitution of the States in which they were situated. Corporations are divided into aggregate and sole. A sole corporation is composed of one person, who is created a corporation in order to confer certain privileges, such as succession, which in his private capacity he would not possess. The king, bishops, deans, parsons, and vicars, in England, are examples of sole corporations.¹

§ 309. Aggregate corporations at common law are combinations of individuals united into one collective body, under a special name, and invested with certain privileges, immunities, and capacities as a body, which do not belong to them as individuals, such as the capacity of succession and perpetuity; and this class of corporations is almost the only one known in this country. Aggregate corporations are subdivided into public and private. Public corporations being founded by

¹ Co. Litt. 8, b. 250, a; 1 Black. Comm. 469, 475; Dartmouth Coll. v. Woodward, 4 Wheat. R. 518.

the government for political purposes solely, (where the whole interest belongs to the government,) such as towns, cities, parishes, counties, government banks, where the stock is exclusively owned by the government, and hospitals endowed by government.¹ And private corporations being any corporation, of which the foundation is private, however extensive or public its uses may be.² Insurance, railroad, canal, bridge, and turnpike companies, colleges, hospitals, and banks, are therefore private corporations, unless they be created and endowed, and owned solely by government.³ So, also, eleemosynary corporations, which are corporations instituted for purposes of charity, if founded by private persons, are private corporations, although they be for general and public charity. Nor does the fact, that the funds of a corporation founded by private persons have been increased by the bounty of government, thereby render the corporation public.⁴

§ 310. If a corporation be public, its existence is dependent upon the pleasure of the government by which it is created, and it may be modified in its constitution and privileges and powers by the government.⁵ But, by common law, a private corporation is not subject to the control or interference of the government, unless it violate its charter, or unless the government in incorporating it, reserve special powers to interfere.⁶

¹ 2 Kent, Comm. Lect. 33, p. 274, 275; *Dartmouth College v. Woodward*, 4 Wheat. R. 518; *Phillips v. Bury*, 2 T. R. 346.

² *Ibid.*

³ *Ibid.* *U. S. Bank v. Planters Bank*, 9 Wheat. R. 907; *Dartmouth Coll. v. Woodward*, 4 Wheat. R. 518.

⁴ *Allen v. McKeen*, 1 Sumner, R. 299; *Phillips v. Bury*, 2 T. R. 346; s. c. 1 Lord Raym. 5, 9.

⁵ *Dartmouth College v. Woodward*, 4 Wheat. R. 518; *Phillips v. Bury*, 1 Lord Raym. 5, § 6; 2 T. R. 346.

⁶ In Massachusetts, by statute, (Rev. Stat. ch. 44, § 23, p. 366,) it is enacted that every act of incorporation, passed after such statute, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature, unless there be an express provision to the contrary in the act.

If, therefore, special powers be not reserved, the government cannot, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, nor can it increase or diminish the number of trustees, nor remove the members, nor change nor control the administration thereof, nor compel it to receive a new charter.¹ A corporation is, of course, subject to the general law of the land, and to the general superintending power of a court of equity, which possesses full jurisdiction in all cases of an abuse of trusts to redress grievances and to suppress frauds.²

§ 311. The incidents of a corporation are stated by Blackstone³ to be, "1st. To have perpetual succession; and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off; 2d. To sue and be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as a natural person may; 3d. To purchase lands, and hold them for the benefit of themselves and their successors; 4th. To have a common seal; 5th. To make by-laws or private statutes for the government of the corporation." Mr. Chancellor Kent adds a fifth incident, namely,—the power of motion or removal of members.⁴ What principally concerns us in the present treatise is their powers and liabilities in respect to their contracts, and these we shall proceed to consider.

¹ *Dartmouth College v. Woodward*, 4 Wheat. R. 518; *Rex v. Passmore*, 3 T. R. 240; *Ellis v. Marsh*, 2 Mass. R. 269; *Wales v. Stetson*, 2 Mass. R. 143.

² *Dartmouth College v. Woodward*, 4 Wheat. R. 518; *Mayor of Coventry v. Attorney-General*, 7 Bro. Parl. Cas. 235; *Attorney-General v. Earl of Clarendon*, 17 Ves. R. 491; 2 Fonbl. Eq. B. 2, pt. 2, ch. 1, § 1, note a; *Green v. Rutherford*, 1 Ves. R. 462; *Attorney-General v. Utica Ins. Co.* 2 Johns. Ch. R. 371.

³ 1 Black. Comm. 475.

⁴ 2 Kent, Comm. Lect. 33, p. 277.

§ 312. A corporation is an artificial person, having a corporate name, and having, in general, the same powers to contract as a natural person, unless it be limited by the charter or act of incorporation, in which case it is bound to observe the exact limits prescribed.¹ Its contracts are generally made through some agent, under the corporate name, who affixes thereto the corporate seal. By the old common law, a corporation could not act or contract by parol, but was bound in all cases to use its corporate seal. But this doctrine has been gradually relaxed, until at the present day, in England, the rule is subjected to the following exceptions, in which it is not required to act under its seal, namely: 1st. Where the acts done are of daily necessity, or too insignificant to be worth the trouble of affixing the common seal; 2d. Where the corporation has a head; as a mayor, or a dean, who may give commands; 3d. Where the acts to be done must be done immediately, and it would be impossible to wait for the formation of a common seal; 4th. Where the very object and purpose of the corporation require that it should have the power of acting without the seal, as in the case of a bank, which must have the power to issue bills of exchange and promissory notes without the seal.² All the exceptions are founded on necessity, or great convenience. In America, however, the old

¹ *Dartmouth Coll. v. Woodward*, 4 Wheat. R. 518; *Allen v. Keen*, 1 Sumner, R. 299; 2 Kent, Comm. Lect. 33, p. 289; *Fleckner v. U. S. Bank*, 8 Wheat. R. 338; *Bank of Columbia v. Patterson's Administrators*, 7 Cranch, R. 299.

² *East London Water Works Co. v. Bailey*, 4 Bing. R. 287; *Church v. Imperial G. L. Co.* 6 Adolph. & Ell. 846; *Randle v. Deane*, 2 Lut. 1497; *Mayor of Stafford v. Till*, 4 Bing. R. 75; *Slark v. The Highgate Archway Co.* 5 Taunt. R. 792; *Broughton v. The Manchester Water Works*, 3 Barn. & Ald. 12; *Smith v. B. & S. Gas Light Co.* 3 Nev. & Man. 771. The rule seems, however, to have been somewhat relaxed in *Beverly v. Lincoln Gas Light Co.* 6 Adolph. & Ell. 829; and in *Mayor of Ludlow v. Charlton*, 6 Mees. & Welsb. 820; *Williams v. Chester and Holyhead Railway*, 5 Eng. Law & Eq. R. 497; *Diggle v. London and Blackwell Railway*, 5 Exch. R. 442; *Clark v. Guardians of Cuckfield Union*, 11 Eng. Law & Eq. R. 442; *Denton v. East Anglian Railway Co.* 3 Car. & Kir. 17; 2 Kent, Comm. Lect. 33, p. 291, note.

common law rule has worn away altogether, and the doctrine obtains, that a corporation may be bound by the contracts of its agents, done within the scope of their authority, whether they be under seal or by parol, or express or implied, and that in respect to the appointment of an agent, or, to his acts and contracts, it stands upon the same footing as a natural person.¹ It is not, therefore, necessary that there should be a vote, or a deed, or any writing, in order to render a corporation liable on a contract, on which a private person would be liable.² It is, however, a general rule, that all contracts made in behalf of a corporation should be made in their corporate name, and if an agent undertake to contract without using the corporate name, he renders himself liable to the same extent, as if he represented an individual.³ But a mere misnomer will not invalidate a grant to or a contract by a corporation, if it can be clearly shown that the instrument was made by or to the corporation.⁴

§ 312 *a*. Yet the non-user of the corporate name by an agent in signing a contract, only operates, at the present time, as *primâ facie* evidence in favor of the corporation; and the presumption which it thus created, may be rebutted by evidence of mistake or surprise; or, indeed, by any evidence,

¹ Bank of Columbia v. Patterson's Administrators, 7 Cranch, 299; United States Bank v. Dandridge, 12 Wheat. R. 69, 70; Fleckner v. The U. S. Bank, 8 Wheat. R. 338; Story on Agency, § 53; Kelley v. Mayor of Brookline, 4 Hill, N. Y. R. 263; 2 Kent, Comm. Lect. 33, p. 291, and cases cited; Bank of the Metropolis v. Guttchlick, 14 Peters, R. 9; Hayden v. Mid. Turnpike Co. 10 Mass. R. 397; The Canal Bridge v. Gordon, 1 Pick. R. 297; Dunn v. Rector of St. Andrews' Church, 14 Johns. R. 118; Essex Turnpike Co. v. Collins, 8 Mass. R. 299; Angell & Ames on Corporations, ch. 9.

² Ibid. See also Mill Dam Foundry v. Hovey, 21 Pick. R. 417.

³ Ibid. See also Mill Dam Foundry v. Hovey, 21 Pick. R. 417; Brinley v. Mann, 2 Cush. R. 337.

⁴ 2 Kent, Comm. Lect. 33, p. 292; Anon. 1 Leon. R. 163; 1 Kyd on Corp. 234, 236, 252; Case of the Chancellor of Oxford, 10 Co. R. 57 (*b*); Road Co. v. Creeger, 5 Harr. & Johns. R. 122; African Co. v. Varick, 13 Johns. R. 38; First Parish in Sutton v. Cole, 3 Pick. R. 232.

which would bind a principal, upon the contract of his agent.¹ Thus, where an agent made a promissory note commencing

¹ In *Melledge v. Boston Iron Co.* 5 Cush. R. 173, Mr. Ch. Justice Shaw said, — “The second prayer for instructions was this: ‘That the defendant corporation’s name not appearing on the notes, and the notes on their face not disclosing any agency, Horace Gray & Co., and not the corporation, are bound by these notes. This instruction was given, as the defendants insist, with such qualifications and restrictions as take away the whole legal effect and operation of it. This is true, and it leads to the other principal question in the present case. It was undoubtedly true that the notes were not signed in the defendant company’s regular name, by which they were incorporated, that the notes on the face of them did not disclose any agency, and that they were signed by Horace Gray & Co., who have a separate firm and house of trade of that name. If it were an absolute and unqualified rule of the law, that upon these facts, Horace Gray & Co., and not the corporation, were bound, and the Court was bound so to instruct, of course that would put an end to the question whether these notes could be the notes of the company. The Court did give the instructions prayed for, but with this qualification, that this ruling was not to be understood as preventing the plaintiff from maintaining his action, if the jury were satisfied, 1st, that these notes are in fact the notes of the Boston Iron Company, executed under a name adopted and sanctioned by them as indicative of their contracts; or, 2d, that the plaintiff received these notes upon a legal demand against the defendants, under misapprehension of the facts, as to the matter that Horace Gray & Co. and the Boston Iron Company were not the same, the plaintiff acting under the belief that they were, and such belief being induced by the acts of the defendants or their legal agents. The effect of the instruction thus given, we think, was, that the facts mentioned in the prayer for instructions, namely, the corporate name not appearing on the notes, and the notes not disclosing any agency, but signed Horace Gray & Co., constituted *primâ facie* evidence, that those were the notes of Horace Gray & Co. and not of the Boston Iron Company, and standing alone would warrant and require the direction that Gray & Co. and not the Iron Company were bound by them, but that this evidence might be rebutted, and controlled by proof *aliunde* that they were in fact the notes of the Iron Company, because executed under a name adopted and sanctioned by them as indicative of their contracts, and it may be added, given in satisfaction of their debt. The Court are of opinion that this direction was correct. If by any possible proof the presumption arising from the face of the note, the form of the execution, the corporate name of the Company, the use of the name of a mercantile firm, could be rebutted, then the evidence was *primâ facie*, and not conclusive. It seems to be now well settled,

"I promise to pay," and signed it with his own name, adding "agent Bellamy Man. Co." and at the same time executed a

in this Commonwealth, since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest, and affect almost every individual in the community, are affected like private persons with obligations arising from implication of laws, equitable duties which imply obligations, with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, acting upon contracts made by those professing to be their agents, and generally from those legal and equitable considerations, which affect the rights of natural persons. We are not dealing here with the weight, force, or effect of the evidence, but only whether any evidence *aliunde* could control the presumption arising from the note.

"And we think there was evidence competent to go to the jury, from which we might infer that this Company had so adopted a name, other than their corporate name, for the special purpose of giving notes, as to be bound by it when used by a general agent, in liquidation of their own debts. This results from a series of decisions both in England and in this country, but particularly in America, quite too numerous to be reviewed here. I will allude to a few. In the Supreme Court of the United States, *Bank of Columbia v. Patterson*, 7 Cranch, 299, it was held that a corporation might be bound both by express and implied provisions, and that by acting on the contracts made by their agents, they adopted and ratified them. In *Dandridge v. United States Bank*, 12 Wheat. the subject is considered at great length, and it is held that a corporation is bound by the same presumptions which would affect a natural person; that the authority of agents may be proved from their acts, and that these corporations may be affected by the parol proof and presumptions of fact in the same manner as natural persons. It is an instructive case, and though the Chief Justice dissented, it has been generally acquiesced in as sound law. In Massachusetts, in *Canal Bridge v. Gordon*, 1 Pick. 297, it was held that a corporation could be bound without vote ordered by implication from corporate acts. It proceeded on the broad ground that corporations can be bound by implication as well as individuals. In *Minot v. Curtis*, 7 Mass. 444, the Court say, we know not why corporations may not be known by several names. As that case arose on pleading, the Court further say that if this point had been before to the jury as a question of fact, the defendants would have been bound to prove the identity of the parish, thus acting under different names. This, of course, would be any proof tending to establish such identity. A case in 10 Mass. 360, *Medway Cotton Manufacturing Co. v. Adams*, is in point with the present, except that there the corporation was plaintiff, whereas here it is defendant. The averment was, that the

mortgage in the name of the company, to secure the payment of it, it was held that the note would bind the company as

defendants, by their promissory note, &c., promised the said Medway Cotton Manufacturing Company, by the name of Richardson, Metcalf, & Co. That came before the Court on demurrer, and held good. The opinion was given by Mr. Justice Sewall, who states the principle on which it was founded. He says, it is a question of identity, which was sufficiently there stated by way of account, to be good on demurrer; but had it been traversed or tried, would, as he states, depend on an inquiry of facts, which may or may not be proved, and may be provable by evidence extraneous to the note. The same point was substantially decided in *Commercial Bank v. French*, 21 Pick. 486.

“Without going more at large into authorities that a corporation may have several names, I will cite the last edition (3d) of Angell & Ames on Corp. 206, who lay down the rule that the misnomer of a corporation on a grant, obligation, or other written contract, does not prevent a recovery thereon by or against the corporation in its true name, provided its identity with that intended by the parties to the instrument be averred in pleading, and apparent in proof; and the authors cite many cases in support of the rule thus stated. The Court are therefore satisfied that it was competent for the plaintiff, if he could, to show by evidence that the note was in fact the note of the Company, given in a name adopted by them to authenticate their contracts, and therefore that the modification prescribed to the rule asked for by the defendants and given, was correct, and adapted to the case then in proof. In this connection several authorities were cited to the point, that when a creditor knows that one acts as agent for a principal in making purchases, takes the note of the agent, without that of the principal, he waives the responsibility of the principal, and gives credit to the agent. This principle, though taken with some qualifications, (*Thomas v. Davenport*, 9 Barn. & Cres. 78. In this case *Littledale* says, — the genuine principle of law is, that the seller shall have his remedy against the principal rather than against any other person,) is no doubt correct, but not applicable to the present case.

“The ground of the plaintiff is, not after taking the note of the agent to revert back to the principal, but to show that the note taken was in fact and in legal effect the note of the company. It was urged in this connection that the Court should have given an opinion on the questions of law stated in this prayer for instructions, and upon the facts there stated; but as we understand it, this was only a part of the evidence; there was much other evidence which was competent, such as the facts, that the company had no meetings except a formal annual meeting; that there was no vote appointing Horace Gray & Co. agents, or appointing any agent, or prescribing the powers of agents; that a large amount of business was done by and in the name of the

their note, if the agent had authority at the time to execute it, or if the transaction was subsequently ratified.¹ So, also,

Iron Company, in the way of purchases, sales, and other dealings, which was done wholly by Horace Gray & Co.; that those were open, notorious, from which construction notice to the company might be inferred — from all which a jury might infer the authority which is the subject of inquiry. If so, the judge would not be called upon to express an opinion on a question of law, arising from part of the evidence — the only question is, whether the judge was correct in submitting the evidence to the jury; and he was so, if there was competent evidence proper for their consideration, and from which they might infer the fact sought to be proved. *Shaw v. Woodcock*, 7 Barn. & Cres. 73. Under this same objection also, the question was discussed, whether a corporation can adopt the name of a mercantile firm, and bind themselves by notes given in its name. It may not be a wise arrangement, but we are not prepared to say they cannot do it. Suppose the case, which actually occurred, as appears in the case of *Goddard v. Pratt*, 16 Pick. 412, a manufacturing company pass a vote or by-law, providing that all their mercantile business shall be done, and contracts made in the name of a partnership, whose stock they have taken, and to whose business they have succeeded. It may be wise in such a case, in order to keep an established, extensive, and valuable correspondence, and retain the run of custom and good-will of an established firm. That case was the reverse of the present, and the struggle was to charge the firm, who defended on the ground that their firm name designated the obligations of the company, and not their own, and the case turned on the question whether the plaintiff, when he dealt with them, knew of the dissolution of the old firm; if he did not, then, by a well-known rule of the law of partnership, the firm were bound to him, not having given notice of their dissolution. Had the point in that case been whether the company were bound, we can have no doubt but they would have been held bound by the vote, for notes made in the name designated. It was further relied on by the defendants, that it was not the intent of Horace Gray & Co. to give the note of the Iron Company, even if they had authority so to do — but further, that there was no evidence that they had such authority. In regard to the first, it depended wholly upon the weight or sufficiency of the evidence, which, for reasons already given, we do not go into.

“As to the authority, it requires some further consideration. Undoubtedly to charge a party by the act of an agent, and corporations can be charged in no other way, it is incumbent on the plaintiff to prove the authority of the

¹ *Despatch Line of Packets v. Bellamy Manuf. Co.* 12 N. Hamp. R. 205. See also *Flint v. Clinton Co.* 12 N. Hamp. R. 430; *Hayward v. Pilgrim Society*, 21 Pick. R. 270.

where a corporation and a firm have the same name, if the party contracting with the corporation suppose the name to

agent. But how is such authority to be proved? No doubt the vote of the corporation entered on their records or minutes is the regular and proper evidence; but they suppress them, pass no votes, keep no records, or refuse to produce them, and yet, *de facto*, transact a large amount of business. If the authority of agents could be proved in no other way than by the production of such a vote, those who deal with them would have but a precarious security for their rights. But we think that it is established by the cases cited, and many others which could be produced, that having proved the constitution of a corporation by the act of incorporation, and the acting under it by the persons incorporated and their associates, the powers of agents as well as any other fact necessary to charge them, may be proved by corporate acts, and by the acts of persons professing to be their agents and servants, and the tacit acquiescence of the body, and by the records and the acts of the body. This was decided in *Narragansett Bank v. The Atlantic Silk Company*, and *Prescott v. Same*, 3 Met. 282. In these cases the defendants had refused, on notice, to produce their records. But so far as third persons are concerned, the production of books which contain no entry on the subject, is the same as if they had refused, on notice, to produce their books. Corporations, like natural persons, may be bound by such acts, as proving either a previous authority or subsequent ratification. When a corporation consists of a small number of persons, like a partnership, it may transact all its business by conversation, without formal votes, and it would be a violation of the plainest principles of justice to hold those who deal with them to prove all their acts by written votes, which they do not keep or do not produce. And incumbent as the powers of agents may be proved by extraneous evidence, the extent and limitation of their powers must be proved in the same manner. And when general and very large powers are exercised, and an agent or firm apparently intrusted with the entire business of the corporation, and no vote appears on the production of their record, prescribing or limiting their powers, the company are as well bound by their declarations and statements, upon the subject of the dealings of the company and whilst acting therein, as by their acts and contracts.

“The next objection is to the qualification annexed by the court to the sixth instruction prayed for and given. The objection is that it assumed a hypothetical case, of which there was no evidence. Whether there was any evidence we cannot judge — but if there was none, it was a mere illustration and explanation of the rule of law, which could not mislead the jury. *Dole v. Thurlow*, 12 Met. 157.

“The next question turns upon the eighth request for instructions. The prayer is as follows: The judge is requested to instruct the jury, ‘that the acts

be used as the corporate name, and such supposition be induced by the corporation, it would be liable.¹ Indeed, gener-

of Horace Gray & Co., and the knowledge of Horace Gray & Co., are not the acts and knowledge of the corporation, except in those matters which were within the scope of their authority as agents; and that if they, without authority from the corporation, held out to the public that the names of Horace Gray & Co. would bind the corporation, the corporation is not bound by the knowledge of Horace Gray & Co. that they had so held themselves out, and it was necessary to bring home knowledge to the company in some other way than by showing knowledge by Horace Gray & Co.' This instruction was given, and the position then taken, and the principles of law there stated declared correct, but accompanied it with the further instruction that if Horace Gray and Horace Gray & Co. were the general and only agent of the company, vested with full powers to act in their behalf, in all matters of purchase and sale, and in giving notes, and in all the business of the corporation, and the concerns of the Boston Iron Company in the way of business were wholly transacted by them, and no others, and that such has been the case for a series of years, and this had knowingly been permitted by the corporation, then it was competent for the jury to find that the corporation has had notice of these acts, of adopting the signature of Horace Gray & Co. for the Boston Iron Company, as promissory notes; and to infer that they had authorized them. Whether these acts seem sufficiently frequent, and of such a character as to satisfy the jury that Horace Gray & Co. did so conduct, &c., was wholly left to the jury, under the various instructions given in the case. The court are of opinion that the instruction with this qualification, and commentings on the evidence, and submitting it to the jury, with these instructions, was correct. The request for instructions assumed a state of facts, which did not constitute the whole case. If the request was founded on the ground that the agents had no authority to use any other name than the corporate name of the company, in giving notes, and that it could not be within the scope of their authority to do so, without express authority or without a vote, or the production of written authority, then, for reasons already given, we think it was not correct in point of law, and ought not to be given; but if such authority, like all other authority, could be proved by evidence *aliunde*, then the only question was, what was their authority, what was its extent and limits, and whether the acts and declarations in question were within its scope; and then it seems to us that it was proper, and the court was bound to add the qualifications stated, and submit the question to the jury."

¹ Despatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. Hamp. R. 205. See also Flint *v.* Clinton Co. 12 N. Hamp. R. 430; Haywood *v.* Pilgrim Society, 21 Pick. R. 270.

ally, the law of agency applying to private individuals, applies with equal force to corporations, and they are equally affected with implied obligations, such as constructive notice, implied assent, tacit acquiescence, and implied ratifications, in respect to contracts made by persons held out by them as their agents.

§ 313. Again, a corporation may sue and be sued for its acts, or upon its contracts, in like manner as if it were a natural person. It may also sue and be sued by its own members, and may contract with them in the same manner as with any strangers.¹ So, also, corporations are liable to a special action on the case for neglect and breaches of duty, — and to actions of trespass and trover for damages occasioned by the trespasses and torts committed by their agents, under their authority.² But as a corporation cannot be arrested, it should be sued by original writ and summons.³

§ 314. Again, corporations have power to make by-laws for their own regulation, unless they contravene the laws of the land, or infringe the provisions of the charter; in which case the by-laws are void.⁴ If there be no provision in the charter to the contrary, the majority of those members, who are present

¹ *Dartmouth College v. Woodward*, 4 Wheat. R. 518; 1 Kyd on Corporations, 13, 69, 189; 1 Black. Comm. 469, 475; *Allen v. Keen*, 1 Sumner, R. 299.

² *Yarborough v. The Bank of England*, 16 East, R. 6; *Smith v. B. & S. Gas Light Co.* 1 Adolph. & Ell. 526; *Townshend v. Susquehannah Turnpike*, 6 Johns. R. 90; 2 Kent, Comm. Lect. 33, p. 284; *Thayer v. Boston*, 19 Pick. R. 516; *Baker v. Boston*, 12 Pick. R. 184; *Eastern Counties Railway v. Broom*, 2 Eng. Law & Eq. R. 406; *Watson v. Bennett*, 12 Barb. S. C. R. 196; *Goodspeed v. East Haddam Bank*, 22 Conn. R. 530.

³ 2 Kent, Comm. Lect. 33, p. 284; *Angell & Ames on Corporations*, ch. 18.

⁴ *Angell & Ames on Corp.* p. 268, (2d ed.); *Ibid.* ch. 10; *King v. Westwood*, 7 Bing. R. 1; *The People v. Throop*, 12 Wend. R. 183; *Westervelt v. New York*, 2 Hoffman, Ch. R.; *Rex v. Bank of England*, 2 Barn. & Ald. 620; 2 Kent, Comm. Lect. 33, p. 296; *Rex v. Spencer*, 3 Burr. R. 1827.

at any regularly appointed meeting of the corporation, may pass by-laws, although they do not constitute a majority of the whole number of members belonging to the corporation.¹ But if the power to make by-laws be committed to a select body of members, as to a board of directors, it is necessary that there should be a majority of such body present in order to act, and then a majority of the quorum may pass by-laws.² In all cases, however, where there is a meeting of the corporation or board of directors, it should be notified to all the members of the corporation or the board, or the acts passed thereby will not be binding on those who have not received notice.³ So, also, if the meeting be stated to be for a special purpose, those present cannot proceed to accomplish a different purpose.⁴

§ 315. Corporations have also a power of electing officers and members; and the regulation of such election may be made by the corporation, if they be not created by the charter. At common law, where the officers of a corporation are directed by the charter to be chosen annually, and through accident, or neglect, or mistake, new officers are not chosen at the appointed time, the better opinion seems to be that the corporation does not thereby lose its power to elect afterwards, when the annual day is passed by without design or fraud.⁵

¹ *Rex v. Varlo*, Cowp. R. 248; 1 Kyd on Corp. 308, 400, 424; *The King v. Bellringer*, 4 T. R. 810; *The King v. Miller*, 6 T. R. 268; *Rex v. Whitaker*, 9 Barn. & Cres. 648; *Ex parte Wilcocks*, 7 Conn. R. 402; *Field v. Field*, 9 Wend. R. 394; 2 Kent, Comm. Lect. 33, p. 293.

² *Ibid.*

³ *Kynaston v. Shrewsbury*, 2 Strange, R. 1051; *Rex v. Liverpool*, 2 Burr. R. 731.

⁴ *Machell v. Nevinson*, 2 Lord Raym. R. 1355; *Attorney-General v. Davy*, 2 Atk. R. 212; *Rex v. Theodorick*, 8 East, R. 543.

⁵ Per Chancellor Kent, in 2 Kent, Comm. Lect. 33, p. 295; *Hicks v. The Town of Launceston*, 1 Roll. Abr. 513; *The Queen v. The Corp. of Durham*, 10 Mod. 12, 146; *The People v. Runkel*, 9 Johns. R. 147; *Ex parte Heath*, 3 Hill, R. 42; *Trustees of Vernon Society v. Hill*, 6 Cowen, R. 23; *McCall*

And in such a case, the old officers may continue to act, until new officers are chosen.¹

§ 316. So, also, corporations have the power of *amotion* of officers, and of disfranchisement of members, for reasonable and sufficient cause. Ordinarily this power is only exercisable by the corporation at large,² after due notice.³ Yet no member can be disfranchised, unless he be guilty of some offence against the corporation.⁴ And no officer can be removed for offences which have not an immediate relation to his corporate trust, unless special powers of removal be reserved in the corporation at his appointment.⁵ General offences against the law of the land are not sufficient cause to support a disfranchisement or amotion, until after conviction thereof by a trial at law.⁶ Disfranchisement is not a necessary consequence of amotion, inasmuch as an officer may be removed without being expelled from the corporation, and deprived of membership.⁷ In joint-stock or moneyed corporations, no stockholder can be disfranchised without special powers reserved to that effect.⁸

§ 317. In all cases, corporate powers are to be strictly construed, and not to be extended beyond the clear in-

v. Byram Man. Co. 6 Conn. R. 428. But see *Rex v. Poole*, 7 Mod. R. 195; *Cas. Temp. Hardw.* 20; *Phillips v. Wickham*, 1 Paige, 590.

¹ *Foote v. Prowse*, 1 Strange, R. 625.

² *The King v. Lyme Regis*, Doug. R. 149; *Angell & Ames on Corp.* 365.

³ *Commonwealth v. Penn. Beneficial Society*, 2 Serg. & Rawle, R. 141; *Kynaston v. Shrewsbury*, 2 Strange, R. 1051; *Rex v. Liverpool*, 2 Burr. R. 731.

⁴ *Commonwealth v. St. Patrick's Society*, 2 Binn. R. 441; *The King v. Richardson*, 1 Burr. R. 517; *Lord Bruce's Case*, 2 Strange, R. 819.

⁵ *Ibid.*

⁶ *Ibid.* See also *King v. Patteson*, 4 Barn. & Ald. 1.

⁷ *Angell & Ames on Corp.* 347; 2 Kent, Comm. Lect. 33, p. 297.

⁸ *Ibid.* *Bagg's Case*, 11 Co. R. 99.

tention of the charter;¹ and all powers must be exercised in the manner and form directed in the charter.² So, also, the acts of the agents of corporations are strictly construed.³

§ 318. In civil corporations there is no visitorial power; but to eleemosynary corporations (which are composed solely of schools, hospitals, and colleges) there is a visitorial power, or power to inspect, direct, and control the corporation and its funds.⁴ If the visitorial power be not expressly given, it is usually understood to be reserved to the founder and his heirs; and on default of heirs, it escheats to the government or courts of law.⁵ But where governors or trustees are appointed, with powers to manage the charity, the visitorial power vests in such trustees or governor.⁶

¹ See *Governor & Co. of Copper Miners v. Fox*, 3 Eng. Law & Eq. R. 420; *Hood v. New York & New Haven Railroad Co.* 22 Conn. R. 502.

² *Bank of Augusta v. Earle*, 13 Peters, R. 587; *Head v. Providence Ins. Co.* 2 Cranch, R. 167; *Bank of U. S. v. Dandridge*, 12 Wheat. R. 68; *Runyon v. Coster*, 14 Peters, R. 122; *First Parish in Sutton v. Cole*, 3 Pick. R. 232; *The People v. Utica Ins. Co.* 15 Johns. R. 358; *Sharp v. Johnson*, 4 Hill, N. Y. R. 92; *Dublin Corp. v. Attorney-General*, 9 Bligh, N. S. 395.

³ *Mayor, &c. of Colchester v. Lowten*, 1 Ves. & Beam. 245; *Case of St. Mary's Church*, 7 Serg. & Rawle, 530; *The King v. Bagshaw*, 7 T. R. 363; *Van Winkle v. R. R. Co.* 2 Green, N. J. R. 162.

⁴ *Dartmouth College v. Woodward*, 4 Wheat. R. 518; 1 Black. Comm. 480; 2 Kyd on Corp. 174; Kent, Comm. Lect. 33, p. 300; *Phillips v. Bury*, 2 T. R. 346.

⁵ *Phillips v. Bury*, 2 T. R. 364; *Dartmouth College v. Woodward*, 4 Wheat. R. 518; *Rex v. St. Catherine's Hall*, 4 T. R. 233.

⁶ *Ibid.* by Story, J. 4 Wheat. R. 674, 675; *Attorney-General v. Middleton*, 2 Ves. R. 327; 2 Kent, Comm. Lect. 33, p. 302; *Allen v. McKeen*, 1 Sumner, R. 276.

CHAPTER IX.

AUCTIONEERS.

§ 319. AN auctioneer differs from a broker in two respects ; in the first place, in the exercise of his functions as auctioneer, he cannot buy either for himself, or for a third person ; and in the second place, he cannot sell at private sale ; while a broker can both buy and sell at private sale.¹ An auctioneer is solely the agent of the seller of the goods until the sale is effected, and then he becomes the agent of the buyer for certain purposes.² As agent for the seller, he has, therefore, a claim for compensation, which is ordinarily in the form of a commission for services, and is determined, in the absence of any special agreement, by the common usage ;³ and also a right to claim a reimbursement for all expenses and advances, properly incurred by him in the course of his agency.⁴ He is, also, enti-

¹ Story on Agency, § 27 ; Wilkes v. Ellis, 2 H. Black. R. 555 ; Daniel v. Adams, Amb. R. 495 ; Barker v. Marine Ins. Co. 2 Mason, R. 369.

² Williams v. Millington, 1 H. Black. R. 81, 84 ; Girard v. Taggart, 5 Serg. & Rawle, 19, 27 ; Emmerson v. Heelis, 2 Taunt. R. 38, 48 ; Kemeys v. Proctor, 1 Jac. & Walk. 350.

³ Bower v. Jones, 8 Bing. R. 65 ; Coles v. Trecothick, 9 Ves. R. 243 ; Maltby v. Christie, 1 Esp. R. 340 ; Eicke v. Meyer, 3 Camp. R. 412 ; Cohen v. Paget, 4 Camp. R. 96 ; Roberts v. Jackson, 2 Stark. R. 225 ; Chapman v. De Tastet, 2 Stark. R. 294 ; Robinson v. New York Ins. Co. 2 Caines, R. 357 ; Story on Agency, § 326, *et seq.* ; Post, § 321, 322, 323, (old sects.,) and cases there cited ; Waldo v. Martin, 4 Barn. & Cres. 319.

⁴ Story on Agency, § 335-339 ; Powell v. Trustees of Newburgh, 19 Johns.

tled to reimbursement from his principal for damages resulting from the agency, unless he be guilty of improper and unauthorized conduct in relation thereto.¹ And for such commission and expenses he has a lien on the goods to be sold, and on the proceeds thereof.² But before he can claim compensation, he must have faithfully performed all his duty; unless, by usage in the particular transaction, a proportional remuneration is allowed for a partial performance.³

§ 320. He is also, ordinarily, entitled to sue either party, while he has a beneficial interest. He may, therefore, personally, sue his principal for damages, or expenses, or for his commission; or he may, as representative of the seller, sue the buyer for the price of the goods,—even although the goods be sold at the house of the principal, and be known to be his property,—or even if he declare the name of the principal at the sale.⁴ But if the goods, which he has sold, do not belong to the vendor, and are claimed by the real owner, he cannot maintain an action against the buyer.⁵

§ 321. Again, he has a right to prescribe the rules of bidding, and the terms of sale; and his verbal declarations at the sale, unless they contravene the printed regulations, or the

R. 284; *Capp v. Topham*, 6 East, R. 392; *Hardacre v. Stewart*, 5 Esp. R. 103; *D'Arcy v. Lyle*, 5 Binney, R. 441; *Rogers v. Kneeland*, 10 Wend. R. 218.

¹ *Adamson v. Jarvis*, 4 Bing. R. 66; *Allaire v. Ouland*, 2 Johns. Cas. 54; *Coventry v. Barton*, 17 Johns. R. 142; *Hardacre v. Stewart*, 5 Esp. R. 103; *Capp v. Topham*, 6 East, R. 392; *Jones v. Nanney*, 13 Price, R. 76; *Denew v. Daverill*, 3 Camp. R. 451.

² *Williams v. Millington*, 1 H. Black. R. 81; *Girard v. Taggart*, 5 Serg. & Rawle, 19, 27.

³ *Hamond v. Holiday*, 1 Car. & Payne, 384; *Broad v. Thomas*, 7 Bing. R. 99; *Dalton v. Irvin*, 4 Car. & Payne, 289; *Reed v. Rann*, 10 Barn. & Cres. 438.

⁴ *Williams v. Millington*, 1 H. Black. R. 81; *Atkyns v. Amber*, 2 Esp. R. 493.

⁵ *Dickenson v. Naul*, 4 Barn. & Adolph. 638; s. c. 1 Nev. & Man. 721.

written particulars of the sale, are admissible against the principal, and binding on him, as an incident to his authority to sell; but if they contradict the printed conditions, they are not binding.¹

§ 322. Where there are printed conditions of sale, if they be brought to the knowledge of the vendee, — as if they be posted upon the auctioneer's box, or in the auction-room, and be seen by him, or be specially referred to in the sale itself, — or, indeed, be made known to him in any way, — they will form a part of the terms of the contract, and will be binding upon the parties.² As where, at a horse repository, there were printed conditions posted up, setting forth, that no warranty of soundness would remain in force beyond twelve o'clock noon of the next day after sale; it was held, that the buyer of a horse was bound thereby, although no special reference was made thereto in the sale itself; inasmuch as he knew of the regulations; and, that, as he did not return the horse within the specified time, he could not recover on the warranty.³ So, also, where the conditions of a sale by auction were, that the goods should be cleared away at the expense of the buyer, in fourteen days, and the price should be paid on or before delivery; and that, if any lots remained uncleared, after the time allowed, the deposit money should be forfeited, the goods resold, and the loss on the resale made good by the purchaser; and the broker gave a bought note, which allowed fourteen days for receiving and delivery; it was held, by the Court of

¹ *Gunnis v. Erhart*, 1 H. Black. 289; *Howard v. Braithwaite*, 1 Ves. & Beam. 209, 210; *Powell v. Edmunds*, 12 East, R. 6; *Slark v. Highgate Archway Co.* 5 Taunt. R. 792. But whether an auctioneer has a right to warrant without special instructions, seems doubtful. See the above cases, and *The Monte Allegre*, 9 Wheat. R. 645.

² *Mesnard v. Aldridge*, 3 Esp. R. 271; *Bywater v. Richardson*, 1 Adolph. & Ell. 508; *Baglehole v. Walters*, 3 Camp. R. 154; *Eagleton v. East Ind. Co.* 3 Bos. & Pul. 55.

³ *Bywater v. Richardson*, 1 Adolph. & Ell. 508. See, to the same point, *Atkins v. Howe*, 18 Pick. R. 16.

Common Pleas, that only the buyer had fourteen days to take away the goods, but that the seller was bound to deliver them immediately.¹ The printed conditions, under which a sale by auction proceeds, cannot be varied or contradicted by parol evidence of verbal statements, made by the auctioneer at the time of the sale, except for the purpose of proving fraud.² Where, however, any thing is done by one party, with the permission of the other, in contravention of the conditions of sale, it would seem to amount to a waiver thereof,³ and of course, if there be any special agreement, varying the conditions, the parties would not be bound by them.⁴ Where, therefore, a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods, which he might purchase, should be set against the debt, and became the purchaser of the goods, and was entered as such by the auctioneer; it was held, that he was not bound by the printed conditions of sale, which specified, that purchasers should pay a part of the price at the time of the sale, and the rest on delivery.⁵

§ 323. In respect to what constitutes an entire contract of sale by auction, the same rules apply as to a common contract of sale. If the consideration be entire, and not distinctly susceptible of apportionment by the very terms of the contract, the contract is entire, and not otherwise.⁶ Where, therefore, several lots of goods, or several things are put up as distinct things, and are knocked down to the purchaser for distinct sums, for which his name is marked in the catalogue against

¹ *Hagedorn v. Laing*, 6 Taunt. R. 162.

² *Shelton v. Livius*, 2 Crompt. & Jerv. 411; *Gunnis v. Erhart*, 1 H. Black. R. 289; *Powell v. Edmunds*, 12 East, R. 6; *Slark v. Highgate Archway Co.* 5 Taunt. R. 792; *Bradshaw v. Bennett*, 5 Car. & Payne, 48.

³ *Ex parte Gwynne*, 12 Ves. Jr. 379.

⁴ *Bartlett v. Purnell*, 4 Adolph. & Ell. 792.

⁵ *Ibid.*

⁶ *Ante*, ch. 2.

each lot or thing, by the auctioneer, there is a distinct contract as to each thing.¹ But if they all be marked down to him at one sum, or as one lot, the contract is entire.²

§ 324. Again, an auctioneer has a special property in the goods sold, and may sue the purchaser for the price thereof, either in his own name, or in the name of his principal;³ unless he make the memorandum of the terms of sale as *agent*, in which case he must, as we have seen, sue in his principal's name, as *agent*, and not in his own as principal.⁴ Although, if the clerk, following his dictation, make the memorandum, the auctioneer may sue as principal.⁵

§ 325. The *duties* of the auctioneer are, in the first place, to take the same care of the goods, which are sent to him for sale, as if they were his own property. His responsibilities and duties, in this respect, are those of a bailee for hire of labor and services, which bailment is technically called *locatio operis*. He is bound to exercise only ordinary diligence and skill, and is not responsible for unavoidable accidents.⁶

§ 326. Again, it is his duty strictly to observe all the instructions of his principal, and all the conditions of sale; and if he deviate from them, he will be personally liable for the consequences, as well in respect to his liabilities, as to his remedies.⁷

¹ *Roots v. Lord Dormer*, 4 Barn. & Adolph. 77; *Emmerson v. Heelis*, 2 Taunt. R. 38; *Baldey v. Parker*, 2 Barn. & Cres. 44; *James v. Shore*, 1 Stark. R. 426.

² *Dykes v. Blake*, 4 Bing. N. C. 463; s. c. 6 Scott, R. 320; *Chambers v. Griffiths*, 1 Esp. N. P. R. 151.

³ *Williams v. Millington*, 1 H. Black. R. 81, 85; *Girard v. Taggart*, 5 Serg. & Rawle, 19, 27.

⁴ *Bird v. Boulter*, 4 Barn. & Adolph. 446. Ante, Agency.

⁵ *Ibid.*

⁶ *Maltby v. Christic*, 1 Esp. R. 340; Story on Bailm. § 431.

⁷ *Jones v. Nanney*, 13 Price, R. 76; s. c. McLell. R. 25; *Bexwell v. Christie*, Cowp. R. 395; *Denew v. Daverell*, 3 Camp. R. 451.

Thus, where goods are intrusted to him to sell at auction, he would not be authorized to sell them at private sale.¹ He would not be bound, however, strictly to obey instructions, which would operate as a fraud upon others. And if no special instructions be given, it is his duty to follow the common custom in the business. If, however, although he disobey his instructions, the principal afterwards, with full knowledge thereof, either expressly, or by implication, assent to his course, such assent will be a ratification thereof, which will entitle him to the same rights as if he had strictly followed his instructions.² In no case, however, can he dispose of goods at private sale, since that would be beside his functions as auctioneer.³

§ 327. So, also, where an auctioneer, after a sale by public auction, receives a deposit therefor from the vendee, it is his duty as the agent, or rather as the stake-holder of both vendor and vendee, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs.⁴

§ 328. Again, the authority committed to an auctioneer is a personal trust, which he cannot delegate to another without the consent of the owner.⁵ He cannot, therefore, authorize his

¹ *Daniel v. Adams*, Ambl. R. 495.

² *Catlin v. Bell*, 4 Camp. R. 183; *Smith v. Cologan*, 2 T. R. 189, note; *Forrestier v. Bordman*, 1 Story, R. 43; *Story on Agency*, § 49, and note; § 242, § 252; *Veazie v. Williams*, 3 Story, R. 612.

³ *Jones v. Nanney*, 13 Price, R. 76; s. c. *McLell. R.* 25; *Bexwell v. Christie*, Cowp. R. 395; *Denew v. Daverell*, 3 Camp. R. 451; *David v. Adams*, Am. R. 495.

⁴ *Edwards v. Hodding*, 5 Taunt. R. 815; *Gray v. Gutteridge*, 3 Car. & Payne, 43; *Spittle v. Lavender*, 5 Moore, R. 270; s. c. 2 Brod. & Bing. 452.

⁵ *Coles v. Trecothick*, 9 Ves. R. 243; *Commonwealth v. Harnden*, 19 Pick. R. 482; *Ess v. Truscott*, 2 Mces. & Welsb. 385; *Coombe's case*, 9 Coke, R.

clerk to act as agent for his employer, in his absence.¹ He is not, however, bound, in all cases, to become the orator on the occasion; but he may employ another person to use the hammer, and make the declamations, provided it be in his presence, and under his immediate direction and supervision.² Nor, in such a case, will his occasional absence for a time during the sale, invalidate the sale.³

§ 329. Again, an auctioneer, like every other agent, cannot, ordinarily, purchase the goods of his principal, either on his own account, or in behalf of a third person. And this rule is founded on the clearest principles of justice and of sound policy; since, in such case, the interest of the agent, as agent, would be wholly at variance with his interest as purchaser, and would tend directly to the furtherance of fraud.⁴

§ 330. The *liabilities* of an auctioneer sometimes result from an omission by him to perform his duties; sometimes they are natural incidents thereto, and sometimes they are assumed by him, either from design or negligence. If he fail to comply with his instructions, and with the conditions of sale; or, if he do not employ ordinary diligence in taking care of the goods intrusted to him for sale; or, if he delegate his charge, and injury accrue; or, if he purchase the goods, or do any other improper act, he is liable therefor to the pur-

75; Com. Dig. Attorney, C. 3; Laussatt v. Lippincott, 6 Serg. & Rawle, 386; Solly v. Rathbone, 2 Maule & Selw. 298.

¹ Coles v. Trecothick, 9 Ves. R. 243.

² Commonwealth v. Harnden, 19 Pick. R. 482.

³ Ibid.

⁴ Barker v. Marine Ins. Co. 2 Mason, R. 369; Church v. Marine Ins. Co. 1 Mason, R. 341; Copeland v. Mercantile Ins. Co. 6 Pick. R. 204; Wright v. Dannab, 2 Camp. R. 203; Gillet v. Peppercorne, 3 Beav. R. 78; Story on Agency, § 13, § 108; Downes v. Grazebrook, 3 Meriv. R. 200.

chaser, and cannot recover his commissions.¹ So, also, if he do not disclose the name of his principal at the time of the sale, he assumes the responsibility of the sale, and is answerable in damages to the vendee for any injury which may have resulted from the non-completion of the contract.² But an auctioneer being only responsible for ordinary diligence, would not be liable when his duties were doubtful; as for an injury arising from an omission to comply with a statute recently passed, of doubtful construction, and which had not received a judicial interpretation.³

§ 331. Where, in a sale by auction, a deposit of money is made by the vendee in the hands of the auctioneer, we have seen, that his duty is to retain it, until the sale is complete, and it is ascertained to whom it belongs. Until the sale is completed, he is the stake-holder of both parties, and is liable therefor.⁴ If, therefore, he pay it over to the vendor before the contract is completed, although he receive no notice from the vendee not to do so, and although he have acted entirely *bonâ fide*, yet, if the sale be annulled on account of the vendor's defect of title, he will be liable to the vendee for the deposit, in an action for money had and received.⁵ But he is not, in such case, liable for interest thereon, unless the money be demanded, or notice be given, that the contract has been rescinded;⁶ or perhaps, unless it be proved, that he made

¹ Ante, § 442 to 446, and cases cited. See also *Brown v. Staton*, 2 Chitt. R. 353; *Nelson v. Aldridge*, 2 Stark. R. 435.

² *Hanson v. Roberdean*, Peake, R. 120; *Mills v. Hunt*, 20 Wend. R. 431; *Franklyn v. Lamond*, 4 Com. B. Rep. 637.

³ *Hicks v. Minturn*, 19 Wend. R. 550.

⁴ *Edwards v. Hodding*, 5 Taunt. R. 815; *Hanson v. Roberdean*, Peake, R. 120; *Gray v. Gutteridge*, 3 Car. & Payne, 40; *Borough v. Skinner*, 5 Burr. R. 2639.

⁵ *Gray v. Gutteridge*, 3 Car. & Payne, 40.

⁶ *Gaby v. Driver*, 2 Younge & Jerv. 549; *Lee v. Munn*, 1 B. Moore, R. 481; s. c. 8 Taunt. R. 45; *Calton v. Bragg*, 15 East, R. 223.

interest thereon.¹ If the auctioneer receive money as a deposit on the sale, knowing that there is a defect in the title, he would, *a fortiori*, be liable therefor, although he had paid it over to the vendor.² But where an action is brought against the auctioneer for the deposit, he cannot recover the costs thereof from the principal, in an action for money had and received, but must declare specially.³

§ 332. Again; if the auctioneer be guilty of negligence, and omit to take proper precautions to secure his commissions, or auction duty, he cannot recover them from the vendor or vendee.⁴ As where the auctioneer sold the goods of A. and B. together, as the goods of A., and C. became the purchaser of some of A.'s goods, and through negligence in not giving C. notice that they belonged to A., C. settled with A. for the price, it was held, that the auctioneer could not recover the price from the buyer.⁵ And it was also held, that, in such a case, if the auctioneer bring an action against the buyer for the price of the goods, the buyer might set off a debt due from A. to him.⁶

§ 333. So, also, if the auctioneer, in selling the goods, undertake to warrant them to be of a certain quality or species, without disclosing the name of the principal, he will be personally liable thereon, whether he were possessed of authority or not. Although, if he have not exceeded the limits of his authority, he will have an action over against his principal. But if he disclose the name of his principal, and make a war-

¹ *Curling v. Shuttleworth*, 6 Bing. R. 121.

² *Edwards v. Hodding*, 5 Taunt. R. 815.

³ *Spurrier v. Elderton*, 5 Esp. R. 1.

⁴ *Denew v. Daverell*, 3 Camp. R. 451; *Capp v. Topham*, 6 East, R. 392; *Jones v. Nanney*, 13 Price, R. 76; *Hicks v. Minturn*, 19 Wend. R. 550.

⁵ *Coppin v. Walker*, 7 Taunt. R. 237.

⁶ *Coppin v. Craig*, 7 Taunt. R. 243.

ranty within the limits of his authority, he will not be personally liable for breach thereof.¹

§ 334. Again, if the auctioneer be guilty of fraud, or deceit, or assume the responsibility of selling disputed goods, he will render himself personally liable to the party defrauded. If, therefore, he have notice that the goods, which he is about to sell, do not belong rightfully to his employer,—or that the title to them is a matter of dispute,—and he, nevertheless, proceed to sell them, he will be personally responsible.² But if he be deceived himself, and be ignorant that his employer has not an undisputed title to the goods, although he will, in the first instance, be responsible to the true owner, yet he will have his remedy against his employer.³ But in cases where he conspires with the vendor to defraud the buyer, he has no remedy against his confederate, for damages recovered against him by the party defrauded.⁴ As it is the fraud which prevents him

¹ *Hanson v. Roberdean*, Peake, R. 120; *Fenn v. Harrison*, 3 T. R. 761; *Catlin v. Bell*, 4 Camp. R. 184; *Prince v. Clark*, 1 Barn. & Cres. 186. There seems to be some doubt whether an auctioneer has, in virtue of his office, a right to warrant without special authority. See *The Monte Allegre*, 9 Wheat. R. 645. But see *Gunnis v. Erhart*, 1 H. Black. R. 289; *Howard v. Braithwaite*, 1 Ves. & Beam. 209, 210; *Powell v. Edmunds*, 12 East, R. 6.

² *Hardacre v. Stewart*, 5 Esp. R. 103; *Adamson v. Jarvis*, 4 Bing. R. 66; s. c. 12 Moore, R. 241.

³ *Adamson v. Jarvis*, 4 Bing. R. 66; s. c. 12 Moore, R. 241; *Medina v. Stoughton*, 1 Salk. R. 210; *Sanders v. Powell*, 1 Lev. 129; *Crosse v. Gardner*, Carth. R. 90. See post, ch. 5. In *Stevens v. Legh*, 24 Eng. Law & Eq. R. 210, the plaintiff sent a horse to the defendant, an auctioneer, to be sold on certain representations known to be false to the owner but not to the auctioneer. The latter sold the horse accordingly, and received the price, but before he paid it over to the plaintiff the purchaser discovered the fraud, rescinded the contract, and gave the auctioneer notice not to pay the price to the plaintiff, but demanded it back: these facts were held to be a good defence by the plaintiff against the auctioneer, in an action for money had and received. See also *Murray v. Mann*, 2 Excheq. R. 538.

⁴ *Merryweather v. Nixon*, 8 T. R. 186; *Adamson v. Jarvis*, 4 Bing. R. 66; s. c. 12 Moore, R. 241.

from recovering, the rule would not apply to a case where he was employed to act merely for the purpose of trying or asserting a right; or where he was deceived into a belief in the goodness of the vendor's title.¹ So, also, if the auctioneer make material misrepresentations, and the purchaser be thereby influenced to buy, he is responsible to the purchaser.²

§ 335. So, also, where the plaintiff, on the sale of a barge, addressed the company present, complaining of ill usage from the owner, and asserted that the owner had a claim against him, by which the company were prevented from bidding, and the barge was knocked off to the plaintiff; it was held, that, under the circumstances, he could not insist upon the sale.³

§ 336. Again, if there be a mistake of a material and essential character, — as, if the property prove to have no existence, or cannot be found, — or any such mistake as that, without it, the party would never have entered into the contract at all, the purchaser may rescind the contract altogether, and is not bound to accept the article and sue for damages.⁴ Nor does it make any difference, that the sale was made under a stipulation, that error or misstatement should not vitiate the sale, if the misdescription be wilfully or fraudulently made, with a design to mislead, and operate to enhance the value of the subject-matter.⁵ Indeed, it has been held, — and this seems to be the justest and truest doctrine, — that if, under such a condi-

¹ Ibid.

² *Bardell v. Spinks*, 2 Carr. & Kir. 646.

³ *Fuller v. Abrahams*, 6 Moore, R. 316.

⁴ *Norfolk v. Worthy*, 1 Camp. R. 340; *Robinson v. Musgrove*, 8 Car. & Payne, 469; s. c. 2 Mood. & Rob. 92; *Flight v. Booth*, 1 Bing. N. C. 377; *Hammond v. Allen*, 2 Sumner, R. 387; *Daniel v. Mitchell*, 1 Story, R. 172; *Sherwood v. Robins*, 3 Car. & Payne, 339; s. c. Mood. & Malk. 191; *Malins v. Freeman*, 2 Keen, R. 25.

⁵ Ibid. *Robinson v. Musgrove*, 8 Car. & Payne, 469; s. c. 2 Mood. & Rob. 92; *Norfolk v. Worthy*, 1 Camp. R. 337. See post, ch. 5.

tion, there be a mistake as to a material part, forming the main or essential inducement to the sale, the contract may be avoided by the buyer, although there was no fraud.¹

§ 337. In the next place, as to the employment by the vendor or auctioneer, of puffers, by-bidders, white bonnets, or decoy-ducks, as they are technically called; that is, persons, who, without having any intention to purchase, are employed by the vendor to raise the price by fictitious bids, thereby increasing competition among the bidders, while they themselves are secured from risk by a secret understanding with the vendor, that they shall not be bound by their bids. And in respect to these persons, the rule of law is, that, if their bidding operate to mislead and deceive the buyer, it will vitiate the sale.² If, therefore, all of the bidders, except the buyer, be bidding for the vendor, or if the bid, immediately preceding the last bid of the buyer, be by a by-bidder or puffer, the sale is voidable by the buyer.³ But if a person, or persons, be employed to bid up to a certain sum, in order to prevent a sacrifice of the property, and the price be afterwards raised by real bidders, the sale will be valid,⁴ unless the express conditions of the sale be thereby violated.

¹ *Flight v. Booth*, 1 Bing. N. C. 377; *Leach v. Mullett*, 3 Car. & Payne, 115; *Sherwood v. Robins*, 3 Car. & Payne, 339; s. c. *Mood. & Malk.* 194; *Dobell v. Hutchinson*, 3 Adolph. & Ell. 355, 372; *Belworth v. Hassell*, 4 Camp. R. 140; *Sugden on Vend.* 264; *Dykes v. Blake*, 4 Bing. N. C. 463.

² See *Towle v. Leavitt*, 3 Foster, R. 360; *Pennock's Appeal*, 14 Penn. R. 446; *Staines v. Shore*, 16 Penn. R. 200.

³ *Bramley v. Alt*, 3 Ves. Jr. 624; *Veazie v. Williams*, 3 Story, R. 620; *Wheeler v. Collier*, *Mood. & Malk.* 125; *Howard v. Castle*, 6 T. R. 642; *Bexwell v. Christie*, *Cowp. R.* 396; *Smith v. Clarke*, 12 Ves. Jr. 477; *Crowder v. Austin*, 3 Bing. R. 368; *Sugden on Vend.* 18, 19.

⁴ *Smith v. Clarke*, 12 Ves. Jr. 477; *Conolly v. Parsons*, 3 Ves. 625, note; *Bramley v. Alt*, 3 Ves. 622; *Veazie v. Williams*, 3 Story, R. 620; *Steele v. Ellmaker*, 11 Serg. & Rawle, 86; *Woodward v. Miller*, 2 Collyer, Ch. Cas. 279.

§ 337 *a*. Again, the vendor may employ by-bidders or puffers, if he give notice to the other bidders of his intention; since, in such a case, it would not operate as a fraud.¹ But in all cases, it behooves the vendor to be careful in making any such secret arrangement; as such bad faith is looked upon with great suspicion in courts of justice, and the cases leave it somewhat doubtful whether a more stringent rule might not be applied.² Where property is advertised to be sold "*without reserve*," the vendor is thereby excluded from any interference either directly or indirectly, which may, under any possible circumstances, affect the right of the highest bidder to be considered as the purchaser, whatever bid he may make. And any such violation of his implied engagement, will render the contract of sale voidable.³

§ 338. If, however, the seller do not authorize the auctioneer or by-bidder to make sham bids, he is not liable in an action by the buyer, although such sham bids were made, because he was wholly disconnected from the fraud; and the remedy of the buyer is against the party making the sham bids.⁴

§ 339. In the next place, as to the operation of the Statute of Frauds upon sales by auction. This statute, in its fourth section, enacts, "that no action shall be brought whereby to charge any person, upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or

¹ *Wheeler v. Collier*, Mood. & Malk. 125; *Crowder v. Austin*, 3 Bing. R. 368; *Oldfield v. Round*, 5 Ves. R. 508.

² See post, *Illegal Sales*, § 521.

³ *Thornett v. Haines*, 15 Law Journal, N. S. 230; *Robinson v. Wall*, 11 Jurist, (Eng.) 577; 2 Phillips, (Eq.) R. 372.

⁴ *Veazie v. Williams*, 3 Story, R. 620.

some other person, thereto by him lawfully authorized." And the seventeenth section of the same statute enacts, that "no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents, thereunto lawfully authorized."¹ Within the terms of both these sections, sales by auction are held to be, on the ground, that although they are made in the presence of many witnesses, yet, that such evidence ought not to be admitted, merely because its quantity would render perjury less frequent; for an opportunity would be, nevertheless, afforded for an indefiniteness of construction, and an uncertainty of practice, which it was the very object of the statute to prevent.²

§ 340. As to the memorandum required by the fourth section, the rule is, that it should distinctly set forth the promise and the consideration, either in itself, or by reference, contained in itself, to something extrinsic, by which they may be made certain; that it should be signed, at least by one party, and that the name of the other should appear on it.³ The

¹ The amount necessary to bring a sale within the provisions of this statute is fixed in New York at \$50; in Vermont at \$40; in Maine at \$30; in New Hampshire at \$33.33; and in Massachusetts at \$50. In Rhode Island this particular provision has never been adopted.

² *Kenworthy v. Schofield*, 2 Barn. & Cres. 947; *Walker v. Constable*, 1 Bos. & Pul. 306; *Emmerson v. Heelis*, 2 Taunt. R. 38; *White v. Proctor*, 4 Taunt. R. 209; *Hinde v. Whitehouse*, 7 East, R. 558.

³ *Kenworthy v. Schofield*, 2 Barn. & Cres. 947; *Stapp v. Lill*, 1 Camp. R. 242; s. c. 9 East, R. 348; *Lyon v. Lamb*, cited *Fell on Merc. Guaranty*, 318; *Morris v. Stacey*, Holt N. P. R. 153; *Champion v. Plummer*, 4 Bos. & Pul. 252; *Morley v. Boothby*, 3 Bing. R. 107. See ante, § 270.

exact terms of the consideration need not, however, be stated; provided it appear distinctly that there is some consideration.¹

§ 341. As to the memorandum required by the seventeenth section, it has been held, that it should contain the full terms of the contract; that is, the names of the buyer and seller, the subject of sale, the price, and the terms of credit, and the conditions of sale, if there be any.² A mere signing of the auction catalogue with the prices of the article bought is not, therefore, sufficient, if there be any conditions of sale not stated therein.³ It is not necessary, however, that the memorandum should be signed by both parties, provided the name of the party charged be affixed thereto with his consent or by his order.⁴ Again, it is not necessary, that all of the terms of the contract should appear upon the same paper; for if they can be clearly and unmistakably collected from several papers referring to each other, or from a defective memorandum, coupled with a letter referring thereto, and supplying the deficiency, it will be sufficient to satisfy the requisitions of the statute.⁵ But the memorandum, or papers, must be suffi-

¹ *Ibid.* *Stapp v. Lill*, 1 Camp. R. 212; s. c. 9 East, R. 348.

² *Champion v. Plummer*, 1 Bos. & Pul. N. R. 254; *Kenworthy v. Schofield*, 2 Barn. & Cres. 947; *Kain v. Old*, 2 Barn. & Cres. 627; *Elmore v. Kingscote*, 5 Barn. & Cres. 583; *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Hinde v. Whitehouse*, 7 East, R. 558.

³ *Hinde v. Whitehouse*, 7 East, R. 558.

⁴ *Johnson v. Dodgson*, 2 Mees. & Welsb. 653; *Schneider v. Morris*, 2 Maule & Selw. 286; *Edgerton v. Matthews*, 6 East, R. 307; *Laythorpe v. Bryant*, 3 Scott, R. 250; *Weightman v. Caldwell*, 4 Wheat. R. 85, and note; *Penniman v. Hartshorn*, 13 Mass. R. 92; *Merritt v. Clason*, 12 Johns. R. 102; *Bartow v. Gray*, 3 Greenl. R. 409; *Douglass v. Spears*, 2 Nott & McCord, 207; 2 Kent, Comm. Lect. 39, p. 510, 511; *Flight v. Bolland*, 4 Russ. R. 298; *Clason v. Bailey*, 14 Johns. R. 487; *Proper v. Parker*, 1 Russ. & Mylne, 625.

⁵ *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Dobell v. Hutchinson*, 3 Adolph.

ciently clear to express the whole contract, without resort to verbal testimony, since, otherwise, the very object of the statute would be frustrated. The only purpose, for which parol evidence in relation to the memorandum is admitted, is as a means of interpretation and explanation, in cases where technical terms are employed.¹

§ 342. This memorandum may be made not only by the parties, but by any "agent thereunto lawfully authorized." And in respect to this provision, the rule is in auction sales, that the auctioneer is the agent of both parties, so as to bind them by an entry in his books of the terms of the sale;² unless the facts of the particular case indicate, that he is not so intended.³ So, also, a clerk of the auctioneer, who attends the sale, and in compliance with the auctioneer's proclamation, when he knocks an article down to the seller, makes a memorandum thereof in his books, without objection by the seller, is a sufficient agent within the meaning of the statute.⁴ If, however, the auctioneer be the agent, he cannot personally bring an action against the buyer; but the action must be brought in the name of the vendor, for whom he acts.⁵ Yet, if the auctioneer's deputy, or clerk, make the entry or memorandum, following the declaration of the auctioneer at the knocking off

& Ell. 356; *Smith v. Surman*, 9 Barn. & Cres. 561; *Lent v. Padelford*, 10 Mass. R. 230; *Philimore v. Barry*, 1 Camp. R. 513.

¹ *Birch v. Depeyster*, 4 Camp. R. 385; *Johnston v. Usborne*, 11 Adolph. & Ell. 549; *Phill. & Amos on Evid.* 738, 739, (edit. 1838).

² *Bird v. Boulter*, 4 Barn. & Adolph. 446, 447. See also s. c. 1 Nev. & Man. 316, note; *Wright v. Dannah*, 2 Camp. R. 203; *Kenworthy v. Schofield*, 2 Barn. & Cres. 945; *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Henderson v. Barnewell*, 1 Younge & Jerv. 389; *Cleaves v. Foss*, 4 Greenl. R. 1; *Jenkins v. Hogg*, 2 Const. R. 821; *Gordon v. Sims*, 2 McCord, Ch. R. 164.

³ *Bartlett v. Purnell*, 4 Adolph. & Ell. 793, 794.

⁴ *Wright v. Dannah*, 2 Camp. R. 203; *Farebrother v. Simmons*, 5 Barn. & Ad. 333; *Henderson v. Barnewell*, 1 Younge & Jerv. 389.

⁵ *Bird v. Boulter*, 4 Barn. & Adolph. 446, 447.

of the article, the auctioneer may maintain an action personally.¹ That is, the agent must not appear in the action to be one of the parties, but to be a third person.² An entry cannot, however, be made by a clerk, not present at the sale, and not making the memorandum in the presence and with the implied consent of the parties, but entering it afterwards at the request of the auctioneer.³

§ 343. In respect to the first exception in the statute, namely, that the buyer shall "accept a part of the goods so sold, and actually receive the same," the rule is, that a final surrender by the seller, and a complete appropriation by the buyer of the whole of the goods, or in the case of an entire contract, of a part of the goods, in process of receiving the whole, are required to satisfy the statute. No such surrender can be final within the meaning of this exception, so long as the seller retains any right of lien, or of stoppage *in transitu*; and no appropriation can be complete, so long as the buyer is at liberty to return the goods, in case they do not correspond to the warranty. The delivery must not only be sufficient to transfer the title, but also to destroy the rights of the vendor over the specific subject-matter, in virtue of the old agreement.⁴ And, therefore, a delivery to any person, who is a mere middle-man,

¹ *Bird v. Boulter*, 4 Barn. & Adolph. 446, 447.

² *Ibid.* *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Wright v. Dannah*, 2 Camp. R. 203; *Sewall v. Fitch*, 8 Cowen, R. 215.

³ *Henderson v. Barnewell*, 1 Younge & Jerv. 389; *Alna v. Plummer*, 4 Greenl. R. 258.

⁴ See ante, § 276 to 281; *Rhode v. Thwaites*, 6 Barn. & Cres. 688; s. c. 9 Dowl. & Ryl. 293; *Baldey v. Parker*, 2 Barn. & Cres. 44; *Phillips v. Bistolli*, 2 Barn. & Cres. 513; *Smith v. Surnam*, 9 Barn. & Cres. 561; *Carter v. Touissant*, 5 Barn. & Ald. 858; *Kent v. Huskisson*, 3 Bos. & Pul. 233; *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Miles v. Gorton*, 2 Cromp. & Mees. 504; *Townely v. Crump*, 5 Nev. & Mann. 608; *Winks v. Hassal*, 9 Barn. & Cres. 375; *Bloxam v. Saunders*, 4 Barn. & Cres. 341.

in whose hands the goods are subject to any control by the vendor, is not sufficient.¹ The delivery of part of the goods sold under an entire contract is sufficient.²

¹ *Astey v. Emery*, 4 Maule & Selw. 264; *Hanson v. Armitage*, 5 Barn. & Ald. 559; *Howe v. Palmer*, 3 Barn. & Ald. 321.

² *Mills v. Hunt*, 17 Wend. R. 333; s. c. 20 Wend. 431; *Coffman v. Hampton*, 2 Watts & Serg. 377.

CHAPTER X.

BROKERS.

§ 314. A BROKER is an agent who is employed to negotiate sales between the parties for a compensation in the form of a commission, which is commonly called brokerage. In the proper exercise of his functions, he does not act in his own name, but only as a middle-man.¹ His business consists in negotiating exchanges; or in buying and selling stocks, and goods, or ships, or cargoes; or, in procuring insurances and settling losses; and, according as he confines himself to one

¹ Among the Romans was a class of persons called *Proxenætæ*, not differing much from a broker in their functions, and receiving also a compensation for negotiating a sale. “*Sunt enim hujus modi hominum, ut tam in magna civitate, officinæ. Est enim Proxenetarum modus, qui emptionibus, venditionibus, commerciis, contractibus licitis utiles, non adeo improbabili, more se exhibent. (Dig. Lib. 50, tit. 14, l. 3.) Proxenetica jure licito petuntur. Si Proxenetæ intervenerit faciendi nominis, ut multi solent, videamus an possit quasi mandator teneri? Et non puto teneri. Quia hic monstrat magis nomen quam mandat, tametsi laudet nomen.*” *Dig. Lib. 50, tit. 14, l. 1, 2.* Domat also gives a full description of a broker according to our law. He says: “The engagement of a broker is like to that of a proxy, a factor, and other agent; but with this difference, that the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair, in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties, in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intention of both parties, and to negotiate in such a manner, as to put those, who employ him, in a condition to treat together personally.”

or other of these branches, he is called an exchange-broker, a stock-broker, a merchandise-broker, a ship-broker, or an insurance-broker.¹ A broker differs materially from a factor. He has no possession of the goods in respect to which he negotiates a bargain, and he is not authorized to sell in his own name; while a factor, as we shall see, not only may have possession of the goods, which he sells, but he also has a special property therein, and may sell them in his own name.² A person may, however, unite in himself the double character of broker and factor, for there is no legal objection to his so

¹ Story on Agency, § 32; 2 Kent, Comm. Lect. 41, p. 622; *Pott v. Turner*, 6 Bing. R. 702; *Rawlinson v. Pearson*, 5 Barn. & Ald. 124; *Highmore v. Molloy*, 1 Atk. R. 206.

² *Baring v. Corrie*, 2 Barn. & Ald. 137, 148; *Pott v. Turner*, 6 Bing. R. 702; *Hearshy v. Hichox*, 7 English, 125. In *Baring v. Corrie*, Mr. Justice Holroyd said: "A factor, who has possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority, and it may be right, therefore, that the principal should be bound by the consequences of such sale; amongst which, the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker, does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said, that, by these means, the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that that cannot be so, unless the principal delivers over to him the possession and indicia of property. The rule stated in the case in *Salkeld*, must be taken with some qualifications; as, for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound; or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of caveat emptor applies. I think, therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that therefore this claim of setoff cannot be allowed."

doing; but his duties and liabilities in respect to each character are none the less different,¹ and they should be carefully distinguished. For example, it is not the business of a person acting as broker to see to the delivery of the goods sold, but it may become his duty to do so, if he also act in the capacity of factor.² So, also, he cannot, as broker, sell in his own name, but, as factor, he may.³

§ 345. In respect to the commission of a broker, the rule is, that he is not entitled to it, nor even to a compensation for his trouble, if he execute his duties in such a manner, that no benefit results from them.⁴ Nor is he entitled to a commission, where he has been guilty of gross misconduct in selling goods.⁵ So, also, if the negotiation be broken off, and the contract be not completed, the broker will not be entitled to recover commissions, although he have been guilty of no fault, and even although the act of the owner prevent the completion of the contract.⁶ But, where a negotiation is commenced by the broker, the parties cannot afterwards, by agreement between themselves, withdraw the matter from his hands, and deprive him of his commission, but he will be entitled thereto, provided he was, up to a certain time, the middle-man, although the contract be afterwards completed without this instrumentality.⁷

§ 346. Primarily, a broker is the agent of the person who

¹ Bell, *Comm. B.* 3, Pt. 1, ch. 4, art. 409, p. 386, (4th ed.); *Id.* p. 477, 478, (5th ed.); *Brown v. Boshmer*, 11 *Clark & Finell* 1, 44; *Story on Agency*, § 32 *a*.

² *Brown v. Boshmer*, 11 *Clark & Finell* 1, 44.

³ *Baring v. Corrie*, 2 *Barn. & Ald.* 148.

⁴ *Diamond v. Holiday*, 1 *Car. & Payne*, 384.

⁵ *White v. Chapman*, 1 *Stark. R.* 113.

⁶ *Read v. Rann*, 10 *Barn. & Cres.* 438; *Broad v. Thomas*, 7 *Bing. R.* 99; *s. c.* 4 *Moore & Payne*, 732; *Dalton v. Irwin*, 4 *Car. & Payne*, 289.

⁷ *Wilkinson v. Martin*, 8 *Car. & Payne*, 1; *Murray v. Currie*, 7 *Car. & Payne*, 584.

employs him, but as soon as he negotiates with any person, as vendee, he becomes also the agent of the latter, for the purpose of receiving and transmitting propositions. So, also, he is the agent of both parties, for the purpose of making the memorandum required by the statute of frauds. The practice of brokers is to keep books, in which they enter the terms of any contract, which they negotiate, and the names of the parties; they then deliver to the buyer a note of such entry, which is called a *sold note*, and a similar note to the seller, called a *bought note*, signed in their own name; and either the entry in the book, or the bought and sold notes, if signed by the broker, would be a sufficient memorandum within the statute of frauds, unless they either of them omit sufficiently to state the terms, or unless they disagree with each other.¹ But if the bought and sold notes do not correspond with each other, or, with the entry in the broker's books, the memorandum would not suffice, if the mistake occasioned any injury.² If the broker be only employed to arrange preliminaries and bring the parties together, and the contract be made by the parties themselves, he would not be an agent so as to bind them by his entry in his books.³

§ 347. The broker, being invested with a personal trust, cannot delegate it to another, although the other be a sub-agent or clerk, unless with the express or implied consent of his principal to his so doing.⁴ So, also, he cannot, ordinarily,

¹ *Rucker v. Cammeyer*, 1 Esp. R. 105; *Hinde v. Whitehouse*, 7 East, R. 558; *Kemble v. Atkyns*, 7 Taunt. R. 260; *Henderson v. Barnewell*, 1 Younge & Jerv. 387; *Beal v. McKiernan*, 6 Louis. R. 407; *Clason v. Bailey*, 14 Johns. R. 484; *Davis v. Shields*, 26 Wend. R. 341.

² *Ibid.* *Thornton v. Kempster*, 5 Taunt. R. 786; *Mitchell v. Lapage*, Holt, N. P. R. 253; *Cumming v. Roebuck*, Holt, N. P. R. 172; *Bird v. Boulter*, 4 Barn. & Adolph. 443; *Davis v. Shields*, 26 Wend. R. 341.

³ *Agurre v. Allen*, 10 Barb. S. C. R. 77.

⁴ *Henderson v. Barnewell*, 1 Younge & Jerv. 387; Story on Agency, § 29, 109; *Magee v. Atkinson*, 2 Mees. & Welsb. 440.

sell the goods of his principal in his own name, unless specially authorized; and if he do, his principal will have the same rights and remedies against the purchaser, as if his name had been disclosed. This rule is adopted, not only upon the ground that, having exceeded his authority, the principal is not bound, for the innocent buyer might nevertheless be injured thereby; but also that, as he has neither the possession of the goods nor the indicia of possession, the vendee cannot be deceived into a belief, that he is the principal, or is acting otherwise than as a broker.¹ But there are some exceptions to this rule, created by usage; as in the cases of policies of insurance, which are commonly made in the name of the policy broker, and which he is then enabled to sue upon.² Unless, however, he act in the capacity of factor, as well as of broker, he cannot, unless in the excepted cases created by usage, contract in his own name.³ He may, of course, be empowered to sell in his own name, which will, of itself, constitute him in so far a factor; and an authority to sell in his own name may be implied from a previous course of dealing between the parties,—but this is a question for a jury.⁴ But if a broker enter into a contract for an undisclosed principal, the latter may sue thereon in his own name; and this rule obtains although there be a rule of the exchange, on which the contract is made, declaring that a contract made for an undisclosed principal shall be regarded as the contract of the broker solely, and although this rule be known to the principal.⁵

§ 348. So, also, he cannot act as agent of both parties,

¹ *Baring v. Corrie*, 2 Barn. & Ald. 148.

² *Paley on Agency*, by Lloyd, 362; 3 *Chitty on Comm. & Man.* 210; *Baring v. Corrie*, 2 Barn. & Ald. 147; *Story on Agency*, § 109.

³ *Baring v. Corrie*, 2 Barn. & Ald. 148; *Johnston v. Usborne*, 11 Adolph. & Ell. 557.

⁴ *Kemble v. Atkyns*, Holt, N. P. R. 434.

⁵ *Humphrey v. Lucas*, 2 Carr. & Kirw. 152.

where he is intrusted with authority to conclude the sale and to fix the terms himself, in behalf of each, for such a power would enable him to effect frauds. Thus, if A. employ him to buy certain goods at the lowest price, and B. employ him to sell similar goods at the highest price, he would not be authorized to make a sale of such goods between those parties.¹ So, also, a broker cannot, ordinarily, buy or sell on credit, unless he be justified in so doing by the usage of trade.² So, also, a broker has ordinarily, no authority to receive payment for property sold by him, and if the purchaser make payment to him, he does so at his own risk, unless from other circumstances an authority to receive it can be inferred.³ Insurance brokers are, however, considered to have acquired by usage an authority to adjust losses, and to receive payment of them; but they can only receive payment in money.⁴ But a broker may be authorized to receive payment, either in express terms, or by necessary implication from the circumstances; as, if he be empowered to sell as a principal; or, if he have been in the habit of receiving payment for the principal in previous dealings; and, in such cases, a payment to him will discharge the purchaser from all liability.⁵

¹ Story on Agency, § 31; *Wright v. Dannah*, 2 Camp. R. 203.

² *Henderson v. Barnewell*, 1 Younge & Jerv. 387; Paley on Agency, by Lloyd, 212; Story on Agency, § 60.

³ *Baring v. Corrie*, 2 Barn. & Ald. 137; *Campbell v. Hassell*, 1 Stark. R. 233; Paley on Agency, by Lloyd, 279, 280; Story on Agency, § 109.

⁴ *Todd v. Reid*, 4 Barn. & Ald. 210; *Scott v. Irving*, 1 Barn. & Adol. 605; *Bousfield v. Creswell*, 2 Camp. R. 545; *Richardson v. Anderson*, 1 Camp. R. 43, note; Story on Agency, § 103, note, § 109; *Russell v. Bangley*, 4 Barn. & Ald. 395; *Bartlett v. Pentland*, 10 Barn. & Cres. 760.

⁵ *Coates v. Lewes*, 1 Camp. R. 444; *Favenc v. Bennett*, 11 East, R. 36; *Whitehead v. Tuckett*, 15 East, R. 400; *Pickering v. Busk*, 15 East, R. 38.

349. The vendor is bound by all acts done by the broker within the limits of his authority. If, therefore, he have authority to sell without any limitation as to price, he may sell at any price, which he himself thinks is reasonable and fair, under the circumstances.¹ So, also, if he be employed to purchase goods of a general description, he cannot be made liable for not procuring them of a particular quality, provided they answer to such description. So, also, if there be no restriction as to the mode in which he shall sell goods, or as to the terms of sale, he may sell by sample, or with warranty.² But he cannot sell upon credit, unless he be justified in so doing by the usage in the particular transaction.³

¹ *East India Co. v. Hensley*, 1 Esp. R. 111; *Paley on Agency*, by Lloyd, 208, 209.

² *Andrews v. Kneeland*, 6 Cowen, R. 354; *The Monte Allegre*, 9 Wheat. R. 643.

³ *Henderson v. Barnewell*, 1 Younge & Jerv. 387.

CHAPTER XI.

FACTORS.

§ 350. A FACTOR is an agent employed to sell the goods or merchandise of his principal, which are in his possession, for a commission. He is often called a commission merchant, or consignee; and the goods received by him for sale are called a consignment. If he reside in the same country as his principal, he is called a home factor; if in a different country, he is called a foreign factor. If he accompany a cargo on a voyage, and have it in charge to sell, he is called a supercargo.¹ But under all these different titles, he is merely a factor, subject to all the liabilities, and having the same rights and duties of this class of agents. A factor differs from a broker, as we have seen, in several important particulars. He may buy and sell in his own name; and he has the goods or merchandise in respect to which his agency is created in his possession; while a broker, as such, cannot, ordinarily, buy and sell in his own name, and has no possession of the goods sold.² The test, as to whether an agent is merely a broker or is a factor, is to be found in the question, whether he has any possession or special property in the subject-matter of sale; for if he has, he is in so far a factor, although he may unite the two characters. If he have no possession or special property, he is

¹ Beawes, *Lex Merc.* 44, 47, (6th ed.)

² *Baring v. Corrie*, 2 Barn. & Ald. 148; 2 Kent, *Comm. Lect.* 41, p. 622, note; *Story on Agency*, § 34.

merely a broker, and his rights, duties, and liabilities are different.

§ 351. In respect to his commission, the rule is, that a factor is always entitled thereto, if he have properly performed his duty. But if he be guilty of gross misconduct, or if he execute his duties in such a manner as to prevent any benefit to the principal, he will not be entitled to receive his commission.¹ So, also, a factor cannot recover the difference, when through his negligence the proceeds of the sale are not equal to the expenses; nor can he recover expenses occasioned by his negligence.² Whether, when the purchaser fails, he is entitled to receive a commission, is a question, which depends upon the usage of trade in the particular place, and in the particular business,³ and in respect to which there does not seem to be any distinct and independent rule of law. Again, whenever he undertakes to guarantee to his principal the payment of the purchase-money, he is entitled to an additional compensation therefor, on account of the risk which he assumes, which is called a *del credere* commission—the phrase *del credere* being equivalent to guaranty or warranty. When the factor assumes this contract of guaranty, he does not render himself primarily responsible to the principal, but only secondarily liable, in case of the failure of the buyer to fulfil his contract; and he is entitled to the general rights of a guarantor, as to notice.⁴ His agreement, however, to sell upon such commission, is not a promise to answer for the debt of

¹ *Diamond v. Holiday*, 1 Car. & Payne, 384; *White v. Chapman*, 1 Stark. R. 113.

² *Dodge v. Tileston*, 12 Pick. R. 328.

³ *Clarke v. Moody*, 17 Mass. R. 145.

⁴ *Gall v. Comber*, 7 Taunt. R. 558; *Peele v. Northcoate*, 7 Taunt. R. 478; *Morris v. Cleasby*, 1 Maule & Selw. 576; *Thompson v. Perkins*, 3 Mason, R. 232; 2 Kent, Comm. Lect. 41, p. 624, 625; *Holbrook v. Wight*, 24 Wend. R. 169. The rule, as stated in *Grove v. Dubois*, 1 T. R. 112, has been expressly overruled.

another, and need not be in writing.¹ And a factor, under a *del credere* commission, is only understood to guarantee the payment by the purchaser, and not the safe remittance to the principal.²

§ 352. In virtue of his special property in goods consigned to his care, a factor may buy and sell in his own name, as well as in the name of his principal; and, in such case, if he be the supposed principal, the purchaser will be entitled to the same rights, as if he were the real principal. Payment to him by the purchaser will therefore discharge the latter from all liability to the principal.³ So, also, the purchaser, in such case, may consider the factor as principal, and set off any debt due from the factor to him against the price of the goods.⁴ Yet, if before all the goods are delivered, and before any part of them is paid for, he be informed that they do not belong to the factor, he cannot set them off against a debt due from the factor, in an action against him by the principal.⁵ Whenever the factor sells in his own name, he may bring an action against the purchaser for the price, and prosecute his remedies in like manner, as if he were actually the principal; and he will also be responsible to the purchaser for the performance of his part of the contract.⁶ Where, however, the

¹ *Couturier v. Hastie*, 16 Eng. Law and Eq. R. 562, and Bennett's note; *Bradley v. Richardson*, 23 Verm. 720.

² *Leverick v. Meigs*, 1 Cowen, R. 645; Story on Agency, § 215. But see *Mackenzie v. Scott*, 6 Bro. Parl. Cas. by Tomlins, 286.

³ Story on Agency, § 112; *Drinkwater v. Goodwin*, Cowp. R. 256; *Johnston v. Osborne*, 11 Adolph. & Ell. 549.

⁴ *Rabone v. Williams*, 7 T. R. 360; *George v. Clagett*, 7 T. R. 359; s. c. 1 Esp. R. 557; *Baring v. Corrie*, 2 Barn. & Ald. 148.

⁵ *Moore v. Clementson*, 2 Camp. R. 22; *Waring v. Favenck*, 1 Camp. R. 85; *Means v. Henderson*, 1 East, R. 335; *Escott v. Milward*, 7 T. R. 361.

⁶ Story on Agency, § 112; *Drinkwater v. Goodwin*, Cowp. R. 256; *Johnston v. Osborne*, 11 Adolph. & Ell. 549.

party dealing with a factor gives exclusive credit to him, he cannot afterwards have recourse to the principal.¹

§ 353. But although, when the factor contracts in his own name, he is entitled to sue the purchaser personally, and to enforce payment from him, yet his rights in this respect may be superseded by the consignor, and the latter may bring his action directly against the purchaser, although the purchaser dealt with the factor, as owner, in good faith; but, in such case, the purchaser will have the same rights, as if he were sued by the factor, and may treat the contract in all respects, as if the factor were the sole principal.² He may, therefore, if he did not know of the capacity of the factor, when the sale was made, set off a debt due to him from the factor.³ So, also, the principal may call upon the purchaser to pay over the money to him and not to the factor, and if the latter should pay no heed to such requisition, he would render himself liable to the principal.⁴ If, however, exclusive credit be given to the factor, the principal could not interfere. The case of a foreign factor is also an exception to this rule;—as, between himself and the purchaser, he is treated as the sole contracting party, and the principal can neither sue nor be sued upon his contract.⁵ Another exception to this rule also obtains in cases where the lien or claim of the factor upon the property bought

¹ *Patterson v. Gandasequi*, 15 East, R. 62; *Addison v. Gandasequi*, 4 Taunt. R. 514; 2 Kent, Comm. Lect. 41, p. 632.

² Story on Agency, § 420, and cases cited; *Taintor v. Prendergast*, 3 Hill, R. 72; *Small v. Attwood*, 1 Younge, R. 407, 452; *Leverick v. Meigs*, 1 Cowen, R. 645; *Smith on Merc. Law*, 135; *Stracey v. Decy*, 7 T. R. 361; *George v. Clagett*, 7 T. R. 359; *Warner v. McKay*, 1 Mees. & Welsb. 595.

³ *Parker v. Donaldson*, 2 Watts & Serg. 9; *Hogan v. Shorb*, 24 Wend. R. 458.

⁴ *Lisset v. Reave*, 2 Atk. R. 394; 2 Kent, Comm. Lect. 41, p. 632.

⁵ Story on Agency, § 423; *Newcastle Man. Co. v. Red River Railroad Co.* 1 Rob. Louis. R. 145. But see, contra, *Kirkpatrick v. Stainer*, 22 Wend. R. 244.

or sold, or its proceeds, equals or exceeds the amount or value thereof; and in such a case, the rights of the agent are paramount to those of the principal; and if the purchaser, after notice thereof, pay over the purchase-money to the principal, he will be liable therefor to the factor.¹ Where a factor receives instructions, he is bound to comply therewith, and if he sell contrary to the directions of his principal, he becomes personally responsible for the entire amount of the debt.²

§ 354. In the absence of express instructions, the powers of the factor depend upon the usage of trade.³ A factor may, therefore, in such cases, sell upon credit, if he be justified by the usage of trade, in the particular business, in respect to

¹ *Hudson v. Granger*, 5 Barn. & Ald. 27, 32; *Story on Agency*, § 408, 424; *Drinkwater v. Goodwin*, Cowp. R. 256; *Paley on Agency*, by Lloyd, 285, 288, 365, 366; *Post*.

² *Walker v. Smith*, 4 Dall. R. 389; *Laussatt v. Lippincott*, 6 Serg. & Rawle, 392.

³ *Etheridge v. Binney*, 9 Pick. R. 272; *Clark v. Van Northwick*, 1 Pick. R. 343; *West Boylston Manuf. Co. v. Searle*, 15 Pick. R. 225; *Goodenow v. Tyler*, 7 Mass. R. 36. See cases cited in the succeeding notes. *Dwight v. Whitney*, 15 Pick. 179; *Evans v. Potter*, 2 Gallison, R. 13. In this case, which was assumpsit for breach of orders against the master of a ship, who was also consignee of an adventure of the plaintiff's, Mr. Justice Story said: "A factor is bound to ordinary diligence in relation to the property confided to him; where his orders leave the management of the property to his discretion, he is bound only to good faith and reasonable conduct. He may lawfully do whatever the cause and usage of the trade requires; and, indeed, unless his orders restrict him, he is bound to conform to this course of the trade. In no case can he wantonly sacrifice the property without being responsible to the shipper. If he can advantageously sell the property, and neglect so to do, he must answer in damages. But if the markets be low, or unusually crowded, if new and unexpected difficulties arise, he is not obliged to sell at all events and under every disadvantage. Neither the interests of commerce nor the good faith due to his employer, would countenance such a proceeding. Neither can a factor lawfully pledge the property of his principal for his own private debts; but he may lawfully pledge it for the duties accruing thereon; or for any other purpose, which the usage of trade sanctions and approves."

which he is agent.¹ But in a case, where such is not the usage of trade, he cannot sell upon credit, without an express authority.² So, also, he cannot allow other than the usual terms of credit. Nor can he improperly hasten a sale, so as to enable him to cover his advances;³ but he must sell at the fair market price.⁴ He may, however, take a negotiable note for the price, payable to himself or order, without rendering himself personally responsible, provided the note be not beyond the usual period of credit.⁵ And even if he should include in such note the price of goods sold on his own account, or on account of other principals, this fact alone could not, as it seems, make him personally liable.⁶ But if, after the usual term of credit has expired, he take a note payable to himself at a future day, he renders himself personally liable.⁷ But, where he complies with the usage, he is not liable, although injury ensue. Thus, where a factor, with orders to sell for cash, sold and delivered the goods, but, according to the usage, did not send in his bill until the next day, before which

¹ *Forrestier v. Bordman*, 1 Story, R. 43; *Van Alen v. Vanderpool*, 6 Johns. R. 69; *McKinstry v. Pearsall*, 3 Johns. R. 319; *Robertson v. Livingston*, 5 Cowen, R. 473; *Hapgood v. Batcheller*, 4 Metcalf, R. 573.

² *Forrestier v. Bordman*, 1 Story, R. 43; *Greely v. Bartlett*, 1 Greenl. R. 172; *Scott v. Surman*, Willes, R. 400; *Van Alen v. Vanderpool*, 6 Johns. R. 69; *Goodenow v. Tyler*, 7 Mass. R. 36; *Burrill v. Phillips*, 1 Gall. R. 360; *Houghton v. Matthews*, 3 Bos. & Pul. 489; *Myers v. Entriken*, 6 Watts & Serg. 44; *Delafield v. State of Illinois*, 26 Wend. R. 192; s. c. 8 Paige, R. 527.

³ *Shaw v. Stone*, 1 Cush. 228.

⁴ *Bigelow v. Walker*, 24 Verm. 149.

⁵ *Goodenow v. Tyler*, 7 Mass. R. 36; *Greely v. Bartlett*, 1 Greenl. R. 175; *Dwight v. Whitney*, 15 Pick. R. 179; *Tarlton v. McWhorter*, 5 Stew. & Port. 289.

⁶ *Hapgood v. Batcheller*, 4 Metcalf, R. 573; *Corlies v. Cumming*, 6 Cowen, R. 181; *Hamilton v. Cunningham*, 2 Brock. R. 351. But see *Brown v. Arrott*, 6 Watts & Serg. 402; *Symington v. McLin*, 1 Dev. & Bat. 291.

⁷ *Wiltshire v. Sims*, 1 Camp. N. P. R. 258; *State of Illinois v. Delafield*, 8 Paige, R. 527; s. c. 26 Wend. R. 192; 2 Kent, Comm. Lect. 41, p. 622, 623.

time the purchaser had become insane and did not pay it, it was held, that the sale was binding on the principal.¹

§ 355. Where a factor, being duly authorized to sell on credit, takes a promissory note payable to himself, he takes it in trust for his principal, and subject to his order, and he would not be personally liable thereon, in the event of the insolvency of the purchaser, before payment.² If, in such case, the factor had guaranteed the sale, the principal would, nevertheless, be entitled to claim the note, or to give notice to the purchaser not to pay it to the factor. So, also, if the factor, in such a case, should fail or die, the note would not pass to his assignees or representatives, but would enure to the benefit of the principal; and if his assignees or representatives should receive payment thereof, or should refuse to surrender it to the principal, they would be personally liable to him.³ In such a case, however, if the party purchasing from the factor did so without knowledge of the principal, he would be discharged by payment to the administrators or representatives of the factor.⁴ The note would, however, be subject, as we shall see, to the lien of the factor for his commission and expenses.

§ 356. In the next place, the factor has possession of the goods, and a special property therein; and in virtue thereof he has a lien upon them, and their proceeds, and the securities given therefor, not only for his expenses and commissions in relation thereto, but for the balance of his general

¹ *Clarke v. Van Northwick*, 1 Pick. R. 343.

² *Messier v. Amery*, 1 Yeates, R. 540; *Goodenow v. Tyler*, 7 Mass. R. 36; *Scott v. Surman*, Willes, R. 400; 2 Kent, Comm. Lect. 41, p. 623; *Titcomb v. Seaver*, 4 Greenl. R. 542; *Edmond v. Caldwell*, 15 Maine R. 340; *Hapgood v. Batcheller*, 4 Metcalf, R. 573.

³ *De Valengin's Adm'rs v. Duffy*, 14 Peters, R. 290; *Godfrey v. Furzo*, 3 P. Wms. R. 185; *Ex parte Dumas*, 1 Atk. R. 234; *Tooke v. Hollingworth*, 5 T. R. 226; *Scott v. Surman*, Willes, R. 400; *Kip v. Bank of New York*, 10 Johns. R. 63; *Thompson v. Perkins*, 3 Mason, R. 232.

⁴ *De Valengin's Administrators v. Duffy*, 14 Peters, R. 290.

account.¹ In this respect, usage has enlarged his rights beyond what is generally allowed to agents, in as far as the ordinary lien of an agent is a particular lien, but his is a general lien. Again, he has a lien for all liabilities fairly incurred by him in the course of his agency, whether they be by advances and payment, or by losses, or, by guaranty, or otherwise.² And his lien for any advances or liabilities, which he may have incurred in respect to goods, attaches not only to those in his possession, but to those which are on their way to him at the death of the consignor.³ So, also, when he has sold the goods, his lien will attach to the price in the hands of the purchaser, and he may, in so far, insist upon payment thereof to him, instead of the principal; and if his lien exceed or equal in amount the price, he may prevent the purchaser from paying any portion of it to the principal.⁴ But to entitle himself to this latter lien, he is bound to give notice to the purchaser, not to make payment to the principal.⁵ His lien is, however, strictly confined to debts created in the course of the agency,⁶ and relates only as to such goods as have come into his possession as factor.⁷

¹ Story on Agency, § 376, and cases cited; 2 Kent, Comm. Lect. 41, p. 640; *Drinkwater v. Goodwin*, Cowp. R. 251; *Colley v. Merrill*, 6 Greenl. R. 50; *Brander v. Phillips*, 16 Peters, R. 129; *Foxcroft v. Devonshire*, 2 Burr. R. 931; *Houghton v. Matthews*, 3 Bos. & Pul. 485; *Stevens v. Robins*, 12 Mass. R. 182; *Olive v. Smith*, 5 Taunt. R. 56; *Walker v. Birch*, 6 T. R. 258; *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Hammond v. Barclay*, 2 East, R. 227; *Kruger v. Wilcox*, Ambl. R. 252; *Godin v. London Ass. Co.* 1 Burr. R. 494.

² *Ibid.* *Bryce v. Brooks*, 26 Wend. R. 367.

³ Story on Agency, § 377; *Hammond v. Barclay*, 2 East, R. 227; Paley on Agency, by Lloyd, 140; and see *Nesmith v. Dyeing*, 1 Curtis, R. 130.

⁴ Story on Agency, § 407; *Drinkwater v. Goodwin*, Cowp. R. 251, 255; *Hudson v. Granger*, 5 Barn. & Ald. 27, 32, 34; Ante, § 96.

⁵ *Drinkwater v. Goodwin*, Cowp. R. 251; *Coppin v. Walker*, 7 Taunt. R. 237; *Coppin v. Craig*, 7 Taunt. R. 243; *Atkins v. Amber*, 2 Esp. R. 493; 3 Chitty on Comm. & Man. 211; Story on Agency, § 407.

⁶ *Ibid.*

⁷ *Dixon v. Stansfeld*, 11 Eng. Law & Eq. 529.

§ 357. Where a factor makes advances, or incurs liabilities, upon a consignment of goods, he may sell them, in the exercise of a sound discretion, and according to the general usage, and reimburse himself for all expenses and liabilities out of the proceeds of the sale; and the consignor cannot interfere, unless there be some existing arrangement between himself and the factor, which controls or varies this right.¹ Thus, if, contemporaneously with the consignment, and with the advances and liabilities, orders be given by the consignor, which are assented to by the factor, that the goods shall not be sold until a certain fixed time, the factor is bound by such agreement, and cannot sell even to reimburse himself for his liabilities and advances, until such time has elapsed.² So, also, if orders be transmitted not to sell under a fixed price, and they are assented to, the factor cannot sell to reimburse himself for his liabilities and advances, unless, after due notice, the consignor refuse to provide any other means to reimburse the factor;³ and if he do sell, without notice or demand, he will be liable to the consignor for damages arising therefrom.⁴ And, indeed, in no case can the factor sell contrary to orders,

¹ *Brander v. Phillips*, 16 Peters, R. 129; *Brown v. McGran*, 14 Peters, R. 479.

² *Pothonier v. Dawson*, 1 Holt, R. 383; *Graham v. Dyster*, 6 Maule & Selw. 1, 4, 5; *Brown v. McGran*, 14 Peters, R. 495; *Blôt v. Boiceau*, 1 Sandf. S. C. R. 111; *Smart v. Sandars*, 3 Common Bench R. 380; *Marfield v. Douglass*, 1 Sandf. S. C. R. 360. But see *Parker v. Brancker*, 22 Pick. R. in which a relaxation of this rule was held to obtain in favor of cases where, by reason of an untoward state of the market, the just expectations of both parties had been defeated, in which case, the factor was held to be empowered to sell, after a demand upon his principal of repayment, and his neglect to repay.

³ *Parker v. Brancker*, 22 Pick. R. 46; *Brown v. McGran*, 14 Peters, R. 495; *Frothingham v. Everton*, 12 N. Hamp. R. 239; *Tucker v. Wilson*, 1 P. Wms. R. 261; *Lockwood v. Ewer*, 2 Atk. R. 303; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 100.

⁴ *Frothingham v. Everton*, 12 N. Hamp. R. 239; *Parker v. Brancker*, 22 Pick. R. 40.

so long as the consignor stands ready and offers to discharge his advances and liabilities.¹ But when a consignment is made without specific orders as to the time or mode of sale, and the factor incurs liabilities and makes advances, the consignor cannot, by subsequent orders given after the liabilities are incurred, or the advances are made, suspend or control the factor's right of sale for the purpose of reimbursing himself therefor, except so far as respects the surplus of the consignment, not necessary to cover the liabilities and advances.² This right of the factor would especially obtain in cases where the consignor becomes insolvent, and where, therefore, the consignment constitutes the only fund for indemnity.³

¹ *Brown & Co. v. McGran*, 14 Peters, R. 495; *Pothonier v. Dawson*, 1 Holt, R. 383; *Graham v. Dyster*, 6 Maule & Selw. 1, 4, 5. The English doctrine goes further than this, and denies to the factor the right to sell contrary to the principal's orders, although the latter neglect on request to repay the advances. *Smart v. Sandars*, 5 Man., Grang. & Scott, 894.

² *Ibid.*; *Marfield v. Douglass*, 1 Sandf. S. C. R. 360.

³ The same general rules as to the duties and powers of a factor are laid down in the Code de Commerce of Holland, articles 80–83, from which we quote the following passage, translated by authority from the Dutch original: “Le commissionnaire (art. 80), pour toutes les actions qu'il aurait à exercer contre son commettant, tant pour le remboursement de ses avances, intérêts et frais, *que pour les obligations courantes qu'il a contractées pour lui*,* aura un privilège sur la valeur des marchandises ou effets que le commettant lui a expédiés de l'étranger pour être vendus pour son compte, s'ils se trouvent à sa disposition dans ses magasins ou dans un dépôt public, ou s'ils se trouvent en sa possession de quelque autre manière, ou si, avant leur arrivée, il peut constater l'expédition qui lui en a été faite par un connaissement ou par une lettre de voiture.” “Le même privilège (art. 81) appartient au commissionnaire auquel ont été envoyés des marchandises ou effets dans le même but, d'un autre lieu situé dans l'intérieur du royaume, mais seulement et exclusivement pour ses avances, intérêts et frais, ou pour les obligations qu'il a contractées par rapport aux marchandises ou effets sur lesquels il veut

* This power, which is in the nature of a general lien, is not given by the corresponding article of the French Code de Commerce (No. 93), or by any of the excellent dispositions of the Spanish code with respect to the rights and liabilities of factors.

§ 357 *a*. But where goods have been consigned to a factor for sale, the transaction would seem to import an obligation on the part of the consignor to give a reasonable credit, so far as concerns a sale of the goods, for all advances made thereon by him, even although the consignment were made without stipulations as to price, time, or mode of sale.¹ If, therefore, he should proceed to sell the goods at once, so as to sacrifice the interests of the consignor, without previous demand of payment for his advances, he would expose himself to a claim for damages.² But he is only bound to wait a reasonable time, and he may then proceed to sell, in the exercise of a sound discretion and in good faith, without demanding repayment of his advances by the principal, or notifying to him an intention to sell.³ Yet the consignor is not bound to wait

exercer son privilège." "Si les marchandises ou effets (art. 82) ont été vendus et livrés pour le compte du commettant, le commissionaire se remboursera sur le produit de la vente du montant de ses avances, intérêts et frais, par préférence aux autres créanciers du commettant." "Si le commettant (art. 83) a envoyé de l'étranger au commissionaire des marchandises ou effets, avec ordre de les tenir en dépôt à sa disposition, ou bien s'il a limité son pouvoir de les vendre, et si le premier est resté en demeure de satisfaire aux obligations pour lesquelles il est accordé un privilège aux termes de l'art. 80, le commissionaire pourra, sur la production des preuves nécessaires, et sur une simple requête, obtenir du tribunal d'arrondissement de son domicile, de faire vendre les marchandises ou effets sur lesquels il est privilégié, en vente publique, ou par deux courtiers nommés par le tribunal, suivant le cours de la bourse ou du marché; et cela soit en totalité, soit en telle partie que le juge ordonnera, selon le montant de la dette."*

¹ Upham *v.* Lefavour, 11 Metcalf, R. 183; Frothingham *v.* Everton, 12 N. Hamp. R. 239.

² Ibid.

³ Marfield *v.* Douglass, 1 Sandf. S. C. R. 360. This doctrine does not, however, obtain in England. See Smart *v.* Sandars, 5 Man., Grang. & Scott, 894.

* No such power is given the French code; and the Spanish code (Art. 127) says, absolutely and without exception, "El comisionario debe sujetarse en el desempeño de su cargo, cualquiera sea la naturaleza de este, á las instrucciones que haya recibido de su comitente." And the language of art. 129 is still stronger: "Pero en ningun caso podrá obrar el comisionista contra la disposicion expresa de su comitente."

until the sale of the goods, or to depend thereon solely for his advances, but may immediately maintain an action therefor, unless there be an agreement to the contrary.¹

§ 357 *b*. When the factor is expressly ordered not to sell at all, and he violates his instructions, the damages would be the difference between the actual price received, and the highest price the article bore in the market between the reception of the instructions and the commencement of the suit; provided the suit be commenced within a reasonable period after the transaction.² But where he is ordered to sell at a fixed price, and he violates his instructions, the measure of damages would be the difference between the price obtained on the sale and the minimum price limited by his instructions.³

§ 358. If, however, no advances have been made, and no liabilities incurred by the factor, he is bound to obey the exact orders of the consignor, and the consignor has a right to control the sale according to his pleasure from time to time.⁴

§ 359. A factor is bound, unless in the excepted case before mentioned, where advances have been made, to obey the orders of his consignor exactly, if they be imperative and not discretionary; and he is liable from any injury resulting from a breach of orders, however proper his motives may have been.⁵ Thus, where a merchant in Philadelphia sent to his correspondent at Bordeaux a cargo of coffee, with orders to "make sale of the coffee immediately on arrival, and forward

¹ *Beckwith v. Sibley*, 11 Pick. R. 482.

² *Marfield v. Douglass*, 1 Sandf. S. C. R. 360.

³ *Blôt v. Boiceau*, 1 Sandf. S. C. R. 111; *Frothingham v. Everton*, 12 N. Hamp. R. 239.

⁴ *Brown v. M'Gran*, 14 Peters, R. 495; *Courcier v. Ritter*, 4 Wash. C. C. R. 549; *Manella v. Barry*, 3 Cranch, R. 415.

⁵ *Manella v. Barry*, 3 Cranch, R. 415; *Courcier v. Ritter*, 4 Wash. C. C. R. 549; *Short v. Skipwith*, 1 Brock. C. C. R. 103; *Marfield v. Douglass*, 1 Sandf. S. C. R. 360; *Catlin v. Smith*, 24 Verm. R. 85.

the returns in the articles mentioned below, in the same vessel," it was held, that the agent was bound to sell immediately on the arrival of the cargo, and that he had no right to exercise any discretion in respect to whether the sale was advisable or not.¹ Where, however, the agent acts only under general instructions, and has discretionary power, he is bound to exercise reasonable care and prudence to do what is for the interest of his principal. And if injury result from his want of ordinary diligence, he will be responsible, although he may have neither been guilty of fraud, nor of such gross negligence as to carry with it the insignia of fraud.² The general measure of diligence, required of a factor as to his consignments, is ordinary diligence, and he is bound to exercise as much care and attention in relation thereto as to his own private property.³ If, therefore, loss arise from his neglect to keep his principal informed of facts material to his interests, he renders himself liable.⁴ It is not necessary, in all cases, that the consignor should give an order in the form of a command, in order to make it the duty of the factor to obey it; for, in the case of a simple consignment of goods, without any interest therein on the part of the consignee, or any advance or liability incurred thereon, the expression of a wish by the consignor may fairly be presumed to be an order;⁵ and any answer by the factor to the effect that he had noted the wish, would be construed to be an assent thereto.⁶ But where advances have been made, and liabilities incurred, in respect of any consignment, the factor has a lien thereupon, and may, therefore, refuse to obey subsequent orders, which would destroy his lien, unless

¹ *Courcier v. Ritter*, 4 Wash. C. C. R. 549.

² *Burrill v. Phillips*, 1 Gallison, C. C. R. 360; *Evans v. Potter*, 2 Gallison, R. 13; *Porter v. Blood*, 5 Pick. R. 54; *Marfield v. Douglass*, 1 Sandf. S. C. R. 360.

³ *Ibid.*

⁴ *Brown v. Arrott*, 6 Watts & Serg. 402.

Brown v. M'Gran, 14 Peters, R. 494.

Ibid.

the consignor give him other security, or be willing to pay him therefor. But if he have received the goods subject to certain orders, he is bound to observe those orders, unless, after reasonable notice, the consignor refuses or neglects to indemnify him for his advances.¹ He cannot, however, retain more than sufficient to indemnify him; and if he retain the whole, contrary to orders, because of a lien for a small amount, he will be responsible.²

§ 360. Where a general authority is given to a factor to buy and sell, he is considered as a general agent, and his acts will be binding on his principal, whether he have violated his private instructions or not.³ So, also, factors employed to do certain acts, have incidental authority to bind their principal, by any acts conducing to the proper performance of their duty.⁴ Thus, if a factor be employed to ship goods for his principal, he is authorized to bind the latter to the payment of freight.

§ 360 *a*. A factor is also bound to give his principal the free and unbiassed use of his own discretion and judgment; to keep and render true accounts; and to keep the property of his principal unmixed with that belonging to himself or others.⁵

§ 361. A factor is bound to keep the goods intrusted to him, with the same care as a prudent man would bestow upon them, if they were his own. The measure of his dili-

¹ *Jolly v. Blanchard*, 1 Wash. C. C. R. 252; *Parker v. Brancker*, 22 Pick. R. 46; *Williams v. Littlefield*, 12 Wend. R. 362, 370; *Holbrook v. Wight*, 24 Wend. R. 169; *Story on Agency*, § 374.

² *Jolly v. Blanchard*, 1 Wash. C. C. R. 252.

³ *Story on Agency*, § 110; 2 Kent, Comm. Lect. 41, p. 619, 620.

⁴ *Story on Agency*, § 110; *Paley on Agency*, by Lloyd, 241; *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386; *Cochran v. Irlam*, 2 Maule & Selw. 301, 303, note.

⁵ *Clarke v. Tipping*, 9 Beavan, 282.

gence is ordinary diligence.¹ He is not, therefore, liable for unavoidable accidents, happening without his default; such as robbery or fire; but if the loss accrue through his gross negligence, or unreasonable want of care, he will be responsible. The question has been much discussed, as to his duties and authority, in regard to insuring the goods consigned to him; and it now seems to be settled, that he has authority to insure them, not only to the extent of his own interest, but also in behalf of his principal.² Whether, if he be a mere naked consignee to take possession of the goods with no power to sell, he would have a right to insure, is more questionable, and does not seem yet to have been directly adjudicated.³ As to his duty in respect of insurance, it seems also to be settled, that he is only bound to insure, in case he has either received express orders so to do, or, in case such an order is to be implied from a previous course of dealing between the parties, or, from the usage of trade.⁴ Where such an order is either expressly or impliedly given, he will be responsible for any damage or loss, which may result from his neglect to insure. And where it is his duty to insure, he is bound to give notice to his principal, in case of his inability to procure insurance.⁵ He may insure in his own name, or in the name of the principal; and, if he elect the former, he may, in case of loss, recover of the underwriters the whole amount of the

¹ *Evans v. Potter*, 2 Gall. R. 13.

² Story on Agency, § 111.

³ Story on Agency, § 111; *Wolfe v. Horncastle*, 1 Bos. & Pul. 323; *Lucena v. Crauford*, 3 Bos. & Pul. 98; 5 Bos. & Pul. 324; *Cornwall v. Wilson*, 1 Ves. R. 509. See, also, particularly, *De Forest v. The Fulton Ins. Co.* 1 Hall, R. 84, 100 to 136.

⁴ Story on Agency, § 111; Smith on Merc. Law, 97; *Smith v. Lascelles*, 2 T. R. 189; *Crawford v. Hunter*, 8 T. R. 13; *French v. Backhouse*, 5 Burr. R. 2727; *Morris v. Summerl*, 1 Cond. Marsh. on Ins. 301, and note; *Randolph v. Ware*, 3 Cranch, R. 503; *Columbian Ins. Co. v. Lawrence*, 2 Peters, R. 49; *Smith v. Cadogan*, 2 T. R. 188; *Wallace v. Tellfair*, 2 T. R. 188, notes.

⁵ *Callendar v. Olerich*, 5 Bing. N. C. 63.

value of the property insured; and the surplus, beyond his own interest, will be a resulting trust for the benefit of his principal.¹

§ 362. In the next place, a factor cannot delegate his office to another, because it is an office of personal trust; unless with the express authority of his principal, or with his implied authority arising from some usage in the trade, or from the particular circumstances of the case.² He cannot, therefore, send away to another person the goods consigned to him for sale at a particular place, although he is unable to sell them there.³ But wherever a right to delegate his authority is necessarily implied in his orders, he may exercise such right; as, if he be ordered to recover a debt, he is authorized to employ proper legal agents.⁴ So, also, he cannot, unless specially authorized, barter the goods of his principal.⁵

§ 363. It is now settled, although it was for a long time a subject of doubt, that a factor cannot pledge the goods of his principal for his own debts and liabilities, even though a bill of parcels and a receipt be given; and if he do, the principal is entitled to recover them from the person to whom they are pledged.⁶ So strictly is this rule applied, that it has been

¹ Story on Agency, § 111, 272, 394.

² *Catlin v. Bell*, 4 Camp. R. 183; *Solly v. Rathbone*, 2 Maule & Selw. 298 a; Story on Agency, § 34 a; *Cochran v. Irlam*, 2 Maule & Selw. 301, n.; Pothier, Pand. Lib. 14, tit. 1, n. 2, 3; *Henderson v. Barnewell*, 1 Younge & Jerv. R. 387.

³ *Catlin v. Bell*, 4 Camp. R. 183.

⁴ 1 Bell, Comm. p. 482, (5th ed.).

⁵ *Guerreiro v. Peile*, 3 Barn. & Ald. 616; Story on Agency, § 113; 2 Kent, Comm. Lect. 41, p. 625, 3d ed.; *Rodriguez v. Heffernan*, 5 Johns. Ch. R. 429.

⁶ Story on Agency, § 113; 2 Kent, Comm. Lect. 41, p. 625-628, 3d ed.; *Evans v. Potter*, 2 Gall. R. 13; *Martini v. Coles*, 1 Maule & Selw. 140; *Shipley v. Kymer*, 1 Maule & Selw. 484; *Graham v. Dyster*, 6 Maule & Selw. 1; *Queiroz v. Trueman*, 3 Barn. & Cres. 342; *Van Amringe v. Peabody*, 1 Mason, R. 440; *Patterson v. Tash*, 2 Strange, R. 1178; *Newsom v. Thornton*, 6 East, R. 17;

held, that, although there should be a request of the consignor accompanying the consignment, that his factor should make remittances in anticipation of sales, yet the factor would not be thereby authorized to pledge the goods in order to raise money to remit.¹ Nor can he pledge by the indorsement and delivery of a bill of lading, any more than by the delivery of the goods themselves.² Indeed, the rule is, that the factor cannot pledge; and the ground of it is stated to be, that if the pawnee will call for the letter of advice, or make due inquiry, as to the source from which the goods came, he can discover, that the possessor holds the goods as factor, and not as vendee, and he is bound to know the extent of the factor's power at his own peril.³

Urquhart v. McIver, 4 Johns. R. 103; *Boyson v. Coles*, 6 Maule & Selw. 14.

¹ *Queiroz v. Trueman*, 3 Barn. & Cres. 342.

² *Martini v. Coles*, 1 Maule & Selw. 140; *Shipley v. Kymer*, 1 Maule & Selw. 484; *Graham v. Dyster*, 6 Maule & Selw. 1.

³ 2 Kent, Comm. Lect. 41, p. 626, 3d ed.; *Patterson v. Tash*, 2 Strange, R. 1178; *Daubigny v. Duval*, 5 T. R. 604; *De Bouchout v. Goldsmid*, 5 Ves. R. 211; *McCombie v. Davies*, 7 East, R. 5; *Martini v. Coles*, 1 Maule & Selw. 140; *Fielding v. Kymer*, 2 Brod. & Bing. 639. This rule, however well settled it may be, does not seem to have met with full approbation. It originated in a nisi prius decision by Chief Justice Lee, in the case of *Patterson v. Tash*, 2 Strange, R. 1178, the report of which case has been said to be inaccurate. It is opposed to the doctrine of the Scottish law, (1 Bell, Comm. p. 483-488, 5th ed.) and to the modern rule, which now obtains generally on the continent of Europe. The rule of the civil law, "Nemo plus juris ad alium transferre potest quam ipse haberet," under which the general power to pledge was denied, although it was affirmed at first in France, Holland, and Italy, (Basnage Trait. des Hypothèques, p. 4 and 6; Pothier, Trait. des Cont. de Nantissement, No. 27, Vol. 2, p. 953; Van Leeuwen Censura forensis Theoretico-Practica, Lib. 4, cap. 7, § 17, p. 472; Averannius, Interp. Juris. Lib. 4, c. 22, § 13, et seq.; Rot. Genuæ de Mercatura, &c. Decisiones, No. 199,) seems to have been relaxed, so as to enable the possessors of movables, and those having the ostensible right of property in goods, to pledge them. (See 1 Bell, Comm. p. 485, and note, 5th ed.; Groenwegen, Tract. de Leg. Abrogatis, in Hollandia, p. 56; Casareg. Dissert. 76, No. 4; Casareg. Il Cambisto Istruito, c. 3, No. 43; Ansaldo De Commercio et Merc. p. 351, ed. 1751, § 41, et seq.) See also the report of the Select Committee of Parliament on the laws relat-

§ 364. But although a factor cannot pledge the goods of his principal as his own, yet if he have a lien thereupon, he may deliver them to a third person, with notice of his lien, and with a declaration, that the transfer is to such person, as agent of the factor, and for his benefit; for this is in effect a continuance of the factor's possession, and does not divest him of his right.¹ So, also, a factor, having goods consigned to him for sale, may put them in the hands of a commission merchant connected with an auctioneer in business, to be sold, and the auctioneer may safely make an advance on the goods, for purposes connected with the sale, and as part payment in advance, or in anticipation of the sale, if such be the custom and ordinary usage in such cases.² But if the factor, in such a case,

ing to merchants, agents, or factors, &c. p. 20, in which this opposite doctrine from that which was affirmed by Mr. Chief Justice Lee, is stated to "be the law of France, Portugal, Spain, Sardinia, Italy, Austria, Holland, the Hanse towns, Prussia, Denmark, Sweden, and Russia." The English doctrine, as stated by Mr. Chief Justice Lee, was at first shaken by the decision of Lord Mansfield, in *Pultney v. Keymer*, 3 Esp. R. 182; but this case was, in its turn, overruled by *Solly v. Rathbone*, 2 Maule & Selw. 298; and *Shipley v. Kymer*, 1 Maule & Selw. 484; *Martini v. Coles*, 1 Maule & Selw. 140; and *Boyson v. Coles*, 6 Maule & Selw. 14; and *Daubigny v. Duval*, 5 T. R. 604, by which it was settled. Its injurious effects, however, were so manifest, that the House of Commons instituted a committee of inquiry into the law and practice of foreign nations, and of England, in respect thereto, which, after long investigation, reported in favor of removing this restriction as to the right of pledging by factors. The result was, that the statute of 6 Geo. 4, ch. 94, and 7 & 8 Geo. 4, ch. 29, was passed, authorizing a factor to pledge to a certain extent the goods of his principal. An additional statute has also been passed in respect to this subject, (5 & 6 Victoria, ch. 39). Several of the American States have followed the example of England, and enacted statutes on the basis of the English statutes; and, particularly, Rhode Island, New York, and Pennsylvania. See the Civil Code of Louisiana, Art. 3214. See 2 Kent, Comm. Lect. 41, p. 629, note; Bell, Comm. Vol. 1, p. 485 to 488, (5th ed.); Story on Agency, § 113, and notes. See also *Williams v. Barton*, 3 Bing. R. 139; *Jennings v. Merrill*, 20 Wend. R. 1; *Purdon*, Dig. 402; *Evans v. Potter*, 2 Gall. R. 14; The Factors' Acts of 4 & 6 Geo. 4, and of 5 & 6 Victoria, are set forth in Smith on Merc. Law, p. 112 to 121.

¹ *Urquhart v. McIver*, 4 Johns. R. 103; *McCombie v. Davis*, 7 East, R. 5.

² *Laussatt v. Lippincott*, 6 Serg. & Rawle, R. 386.

should place the goods in the hands of the auctioneer for any other purpose than that of sale, and he should advance money on them as a pledge, the transaction would be invalid.¹

§ 365. A factor may, however, pledge negotiable paper as a security for his own debt, and thereby bind his principal, unless the latter can charge the party receiving it with notice of the fraud, or of the want of title; for, from reasons of public policy, the mere possession of negotiable paper carries with it an imperative presumption of title and power of disposal.² So, also, factors may pledge the goods of their principal for the payment of the duties and other charges due thereon, and for advances lawfully made on account of their principal, and for any other charges and purposes, which are allowed and justified by the usage of trade.³ Of course, if he be expressly

¹ *Martini v. Coles*, 1 Maule & Selw. 140.

² *Collins v. Martin*, 1 Bos. & Pul. 648; *Treuttel v. Barandon*, 8 Taunt. R. 100.

³ *Evans v. Potter*, 2 Gall. R. 13; *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386. This doctrine is so laid down in *Story on Agency*, § 113. See, also, note 2. Mr. Justice Story says: "This I conceive to be the true doctrine, notwithstanding the language used in some of the authorities. The case of *Pultney v. Keymer*, 3 Esp. R. 182, may be deemed overruled by the latter cases, and especially by the cases of *Shipley v. Kymer*, 1 M. & Selw. 484; *Solly v. Rathbone*, 2 M. & Selw. 298; *Cockran v. Irlam*, 2 M. & Selw. 301; *Martini v. Coles*, 1 M. & Selw. 140; and *Boyson v. Coles*, 6 M. & Selw. 14, as to the point of advances made to an agent on his own account. See also *Daubigny v. Duval*, 5 T. R. 604; *Queiroz v. Trueman*, 3 B. & Cres. 342; *Mark v. Bowers*, 16 Martin, R. 95. In *Martini v. Coles*, 1 M. & Selw. 140, Lord Ellenborough and Mr. Justice Le Blanc recognized the right to pledge for advances and charges on account of the principal. The case of *Solly v. Rathbone*, 2 M. & Selw. 298, and *Cockran v. Irlam*, 2 M. & Selw. 301, note, do, it must be admitted, seem to overturn the authority of *Pultney v. Keymer*, 3 Esp. R. 182, as to the point of advances and charges made on account of the principal. But in each of those cases, there was this ingredient, that it was not the case of a mere pledge for advances and charges on account of the principal, but a delegation also of authority to the pledgee, as subagent or co-agent, to sell the goods, which was held to be tortious; as an agent could not

authorized to pledge the goods, he may exercise such power. But what circumstances are sufficient to raise an implied power, does not seem to be clearly settled.

§ 366. If a factor take a security payable to himself from a purchaser of goods, and give his own security to his principal, without giving the name of the purchaser, the factor cannot compel his principal to refund the money paid him, on failure of payment by the purchaser.¹ For he thereby induces the principal to trust to the security, and assures him of the solvency of the purchaser.

delegate his authority. *Pro tanto*, no doubt, the authority was void. But why should the pledge be held void as to advances and charges made for the principal? The ground seems to have been, (whether it be satisfactory or not,) that the sale by the pledgee, as coagent or subagent, made the whole proceeding tortious *ab initio*. That doctrine would not apply to a mere pledge for advances and charges required to be made for the principal, where the original agent still retained his general authority. This whole subject is very accurately and clearly discussed, and the results stated in Mr. Chancellor Kent's learned Commentaries. 2 Kent, Comm. Lect. 41, p. 625 to 628, (3d ed.). What circumstances will or will not amount to an implied authority to agent, from whom advances are asked, to make a pledge for such advances, is a matter upon which the authorities leave much doubt; and especially the cases of *Graham v. Dyster*, 2 Stark. R. 21; and *Queiroz v. Trueman*, 3 B. & Cres. 342; and *Laussatt v. Lippincott*, 6 Serg. & R. 386; *Newbold v. Wright*, 4 Rawle, R. 195."

¹ *Simpson v. Swan*, 3 Camp. R. 291; *Lefevre v. Lloyd*, 5 Taunt. R. 749; *Goupy v. Harden*, 7 Taunt. R. 159.

CHAPTER XII.

SHIPS' HUSBANDS.

§ 367. A SHIP's husband is a person employed by the owner of the ship, to superintend all matters relating to the repairs, equipments, management, and other concerns of the ship. His duties and powers are frequently defined by special agreement. When they are not, he is generally bound to see that the ship is properly repaired, equipped, and manned; to procure freights or charter-parties; to preserve the ship's papers; to make the necessary entries, and to adjust freight and averages; to disburse and receive moneys; to keep and make up the accounts as between all the parties interested; to see to the due furnishing of provisions and stores; and to settle all the contracts with creditors for furnishings.¹ Without special powers, he cannot, however, borrow money generally for the use of the ship; nor take bills for the freight, and give up possession and lien over the cargo; nor insure, so as to bind the owners for the premium.² He has a lien for all expenses and disbursements made by him as agent;³ and his duties and liabilities are generally those of a general agent.

¹ Abbott on Shipp. (Shee's 'ed.) p. 92; Story on Agency, § 35; 1 Bell, Comm. 503 to 504, (5th ed.); French v. Backhouse, 5 Burr. R. 2727; Sims v. Brittain, 4 Barn. & Adolph. 375; English Law Magazine, Art. Mercantile Law, no. 13.

² 1 Bell, Comm. 503 to 505 (5th ed.); Abbott on Shipp. (Shee's ed.) p. 92; Beawes, Lex Merc. 47.

³ Holderness v. Shackels, 8 Barn. & Cres. 612.

CHAPTER XIII.

MASTERS OF SHIPS.

§ 368. THE master of a ship has a general authority, growing out of his official relation to the ship, to make all contracts incidental to her ordinary employment. He may hire seamen for the voyage; he may let the ship on a charter-party, or take shipments on freight, if such be her usual employment, and not otherwise; he may contract for necessary repairs and equipments for the voyage, — unless a ship's husband be employed, who is known to the party contracting with the master; he may hypothecate the ship in foreign ports for money advanced to supply its necessities, if they cannot be otherwise supplied, — in which case the payment of the money borrowed must depend upon the arrival of the ship,¹ — or he may, under certain circumstances, sell the ship and cargo. But he cannot mortgage the vessel so as to transfer the property in it to one who lends money to put her in repair.² Nor can he hypothecate the vessel, and also pledge the owner's personal credit.³ He is sometimes, also, appointed supercargo, or consignee of the cargo; in which case, he is not only the agent of the owners of the ship, but also of the consignors; and in his latter capacity is a factor. If the owner of the ship and the consignor be the same person, the master is liable to him in two charac-

¹ *Stainbank v. Fenning*, 6 Eng. Law & Eq. R. 412.

² *Stainbank v. Shepard*, 20 Eng. Law & Eq. R. 547.

³ *Ibid.*

ters, which are carefully to be distinguished. During the voyage, he acts as master; but after the cargo has arrived at its destination, he is generally treated as acting solely in the capacity of consignee.¹ Under ordinary circumstances, the master, in his official capacity, has no other relation to the cargo than that of carrier; but in cases of extreme emergency and necessity, he becomes a consignee and supercargo by the mere effect of law; for the purpose of jettison and of sale.

§ 369. And here it is proper first to state, that although a master of a ship cannot generally delegate his authority to another person, yet this rule does not restrain him with the same force, that it does agents in general. In cases of emergency or necessity, in a foreign port, in the absence of the owner or employer, he is invested with power to delegate his authority as master, whenever it may be necessary or proper for the welfare of the ship, or the accomplishment of the voyage.²

§ 370. And, in the first place, the master may contract for the purchase of the equipments and furnishings of the vessel. In this respect, the usage of trade has invested him with all the powers of a general agent, and his relation to the ship creates so strong a presumption of his authority, that special notice of the contrary would be required to overcome it.³ If, however, a ship's husband be employed, the procurement of

¹ *Curtis on Merchant Seamen*, p. 207; *Story on Agency*, § 36; *Williams v. Nichols*, 13 Wend. R. 58; *Kendrick v. Delafield*, 2 Caines, R. 67; *Earle v. Rowcroft*, 8 East, R. 126; *The Vrouw Judith*, 1 Rod. Adm. R. 150; *The St. Nicholas*, 1 Wheat. R. 417; *Abbott on Shipp.* Pt. 2, ch. 4, § 1, n. 1.

² *Domat*, B. 1, tit. 16, § 3, art. 3; 1 *Bell*, Comm. 505 to 508, 5th ed.; *Story on Agency*, § 36; *Dig. Lib.* 14, tit. 1, ch. 1, § 5; *Pothier*, Pand. Lib. 14, tit. 1, n. 3.

³ *Story on Agency*, § 119; 1 *Bell*, Comm. p. 506, 507, (5th ed.); *Abbott on Shipp.* Pt. 2, ch. 2, § 1 to 11; 3 *Kent*, Comm. Lect. 46, p. 158 to 176; *James v. Bixby*, 11 Mass. R. 34; 1 *Livermore on Agency*, 157, 158, (ed. 1818).

equipments and necessities would be properly his duty, and no person, knowing such a fact, would be authorized to contract with the master in respect thereto.¹ So, also, the master may borrow money for the purpose of procuring necessities for the ship, and the owners will be liable therefor, if the circumstances of the case fairly justified him, whether the ship be in a foreign port or not.² But his authority is limited by his necessities; and if the repairs have been obtained on credit, the master cannot afterwards borrow money to pay the bill,³ nor can he pledge the owner's credit for the care and maintenance of seamen injured by an accident and put on shore, if the vessel is able to proceed without them.⁴

§ 370 *a*. A master has no power to charge his owners by signing bills of lading for goods never put on board his vessel.⁵ Nor, after he has executed a regular bill of lading in favor of one consignor, can he prejudice him by subsequently executing another bill of lading acknowledging the property to belong to another party.⁶

§ 371. If exclusive credit be given to the master, he alone is liable.⁷ But if credit also be given to the owners, the presumption in favor of the master's authority to contract only extends

¹ 1 Bell, Comm. 413; *Marquand v. Webb*, 16 Johns. R. 89; *Schermerhorn v. Loines*, 7 Johns. R. 311; *Muldon v. Whitlock*, 1 Cowen, R. 290; *Ex parte Bland*, 2 Rose, R. 91.

² *Hussey v. Allen*, 6 Mass. R. 163; *James v. Bixby*, 11 Mass. R. 34; *Wainwright v. Crawford*, 4 Dall. R. 225; *Milward v. Hallet*, 2 Caines, R. 77; *Webster v. Seekamp*, 4 Barn. & Ald. 352; *Stewart v. Hall*, 2 Dow, R. 29; *The Brig Sarah Ann*, 2 Sumner, R. 215; *New England Ins. Co. v. The Brig Sarah Ann*, 13 Peters, R. 387; *Edwards v. Havell*, 21 Eng. Law & Eq. R. 303.

³ *Beldon v. Campbell*, 6 Eng. Law & Eq. R. 473.

⁴ *Organ v. Brodie*, 28 Eng. Law & Eq. R. 530.

⁵ *Grant v. Norway*, 2 Eng. Law & Eq. R. 337; *Hubbersty v. Ward*, 18 Eng. Law & Eq. R. 551.

⁶ *Covill v. Hill*, 4 Denio, R. 324, *Bronson*, C. J.

⁷ *Thorn v. Hicks*, 7 Cowen, R. 697.

to necessaries for the ship. The term *necessaries* is not, however, to be construed according to its literal import, but is understood to embrace all things, which are suitable and proper, and which the ship might reasonably be supposed by a prudent owner to need.¹ If, therefore, the party contracting with the master furnish goods not proper, he can only look to the master for payment; and it is for him to prove, that the articles furnished were fit and proper.² But if credit be given to both parties, and the goods furnished be fit and proper, the person supplying them may look to both parties. So, also, if no credit be given to the master, he is not personally liable;³ but he will be always personally bound, unless he expressly confine the credit to owners of the ship.⁴ The only question in all these cases, by which the liability of either or both parties is determined, is to whom the credit was given.⁵ But when a person dealing with the master as agent knows that the agency of the latter is restricted in respect to the particular subject-matter, he cannot claim to have the terms of his contract fulfilled, as against the owner.⁶

§ 372. In the next place, the master is, in cases of great emergency or necessity, invested, by operation of law, with authority to sell the ship and cargo. Where the master has met with severe accidents, by which the vessel is crippled and unable to perform her voyage, he is bound, in the first place, to repair her, if she is worth repairing; and for this purpose, he must first apply all his personal funds on board, and

¹ Webster v. Seekamp, 4 Barn. & Ald. 354; Rosher v. Busher, 1 Stark. R. 27.

² Abbott on Shipp. (Story's ed.) 106, and note by Mr. Justice Story; Cary v. White, 1 Bro. Parl. Cas. 284; Mackintosh v. Mitcheson, 4 Excheq. R. 175.

³ Farmer v. Davies, 1 T. R. 108; Hoskins v. Slayton, Cas. Temp. Hard. 376.

⁴ Rich v. Coe, Cowp. R. 636; Abbott on Shipp. Pt. 2, ch. 3, p. 115.

⁵ Harrington v. Fry, 2 Bing. R. 181.

⁶ Barnard v. Wheeler, 24 Maine R. 412.

then he may raise money upon the personal credit of the owner, and of the ship, and, if necessary, by bottomry.¹ But if the vessel be not worth repairing, and the expense of repairing would be ruinous to the interests of the owner, or if the master be wholly unable to procure money wherewith to make repairs, he may, acting in good faith and for the benefit of all concerned, sell the ship.² But in case the vessel could be repaired, it must manifestly appear, that the sale was a necessary one to protect the interests of the parties, — and also, that the vessel was not only in great want of repairs, but that money could not be obtained by the master to repair her; or, as the rule is stated, the necessity to sell must be of a moral nature.³ Nor does it matter in respect to the master's right to sell, whether the vessel be stranded on the home shore, or in a foreign port.⁴ The doctrine has been laid down by Mr. Justice

¹ The *Nelson*, 1 Haggard, Adm. R. 169; The *Zodiac*, 1 Haggard, Adm. R. 320; The *Rhadamanthe*, 1 Dodson, Adm. R. 201; The *Augusta*, 1 Dodson, Adm. R. 283; The *Sydney Cove*, 2 Dodson, Adm. R. 11; The *Virgin*, 8 Peters, R. 538; The *Aurora*, 1 Wheat. R. 96; *Murray v. Lazarus*, 1 Payne, R. 572; The *Fortitude*, 3 Sumner, R. 228; The *Brig Hunter*, Ware, R. 249; The *Reliance*, 2 Haggard, Adm. R. 90; The *Packet*, 3 Mason, R. 255; The *Tartar*, 1 Haggard, Adm. R. 1; *Pope v. Nickerson*, 3 Story, R. 465.

² The *Fanny & Elmira*, Edwards, Adm. R. 118; *Idle v. Royal Exch. Ins. Co.* 8 Taunt. R. 775; *Green v. Royal Exch. Ins. Co.* 6 Taunt. R. 68; *Read v. Bonham*, 3 Brod. & Bing. 147; *Robertson v. Clark*, 1 Bing. R. 445; *Reid v. Darby*, 10 East, R. 143; *Hayman v. Molton*, 5 Esp. R. 65; *Allen v. Sugrue*, 8 Barn. & Cres. 561; *Somes v. Sugrue*, 4 Car. & Payne, 276; The *Tilton*, 5 Mason, R. 465; The *Brig Sarah Ann*, 2 Sumner, R. 206, 215; *Gordon v. F. & M. Ins. Co.* 2 Pick. R. 249; *Winn v. Columbian Ins. Co.* 12 Pick. R. 279; *Fontaine v. Phoenix Ins. Co.* 11 Johns. R. 293; *Patapsco Ins. Co. v. Southgate*, 5 Peters, R. 604, 620; *Scull v. Bridle*, 2 Wash. C. C. R. 150; *Am. Ins. Co. v. Center*, 4 Wend. R. 45; *Pope v. Nickerson*, 3 Story, R. 465.

³ *Ibid.* The *Tilton*, 5 Mason, R. 465; *New England Ins. Co. v. The Brig Sarah Ann*, 13 Peters, R. 387; *Robinson v. Commonwealth Ins. Co.* 3 Sumner, R. 220; *Gordon v. Mass. Fire & Mar. Ins. Co.* 2 Pick. R. 249; *Hall v. Franklin Ins. Co.* 9 Pick. R. 466; The *Eliza Cornish*, 26 Eng. Law & Eq. R. 579.

⁴ *New England Ins. Co. v. The Brig Sarah Ann*, 13 Peters, R. 387; s. c. 2 Sumner, R. 206.

Story, in the following terms.¹ “It is not sufficient to a valid sale by the master, that he acted with good faith, and in the exercise of his best discretion. There must be a moral necessity for the sale, so as to make it an urgent duty upon the master to sell for the preservation of the interests of all concerned. If the circumstances were such, that an owner of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion, that the vessel could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lies, — then a sale by the master is justifiable, and must be deemed to have been made under a moral necessity. The master thus becomes the agent of all concerned in the voyage, and when an abandonment has been accepted by the underwriters, he becomes, by relation, their agent, from the time of the loss to which the abandonment relates; and a sale by him is made as agent of the underwriters.”

§ 373. A case of moral necessity will be made out, whenever the vessel has suffered an actual total loss, and cannot be rescued at all from the peril; or, when she has suffered a technical total loss, and her repairs will cost more than her value after she is repaired; or, when the means of repairing her cannot be procured.² But the expense of making repairs is not to be estimated by their cost at the place where she lies, provided she can be put into a state to be navigated safely into a port, where the repairs can be made for so much less a sum, as to make it the duty of the master to repair her.³

¹ The Sarah Ann, 2 Sumner, R. 206.

² Gordon v. Mass. Fire & Mar. Ins. Co. 2 Pick. R. 249; American Ins. Co. v. Center, 4 Wend. R. 45; Hall v. Franklin Ins. Co. 9 Pick. R. 466; New England Ins. Co. v. The Brig Sarah Ann, 13 Peters, R. 387.

³ Hall v. Franklin Ins. Co. 9 Pick. R. 466.

§ 374. Again, the master may also sell the cargo in two cases. First, in case the ship be wrecked, so that she is unable to proceed upon the voyage, he may sell the cargo, provided it be of a perishable nature, so that it cannot be transmitted by another vessel.¹ If it be not of a perishable nature, it is his duty to forward it in another vessel to its port of destination; and if a vessel cannot be procured in the port where he is wrecked, he must go to a contiguous port to procure one.² But he is not obliged to go further than a "port immediately contiguous," for the purpose of seeking another vessel.³ In case then he can find no vessel, in which to forward the goods, his duty would seem to be, if they were not perishable, to store the goods, and wait for orders from the shipper.⁴ Again, if, although the cargo be of a perishable nature, it, nevertheless, can be transmitted without injury, he is bound to transmit it, if he can find a ship, and if he cannot, his duty is to sell.⁵ If, again, the vessel can be repaired in a reasonable time, and the cargo be not perishable, the master may store it until the repairs are completed, and then proceed with it in his own ship.⁶ Where the cargo is of a perishable nature, much is

¹ *Pope v. Nickerson*, 3 Story, R. 465; *The Gratitude*, 3 Rob. Adm. R. 240; *The Packet*, 3 Mason, R. 255; *Shipton v. Thornton*, 9 Adolph. & Ell. 314; *Jordan v. Warren Ins. Co.* 1 Story, R. 342.

² *Wilson v. Royal Exch. Assur. Co.* 2 Camp. N. P. R. 623; *Schieffelin v. New York Ins. Co.* 9 Johns. R. 21; *Searle v. Scovell*, 4 Johns. Ch. R. 218; *Mumford v. Com. Ins. Co.* 5 Johns. R. 262.

³ *Saltus v. Ocean Ins. Co.* 12 Johns. R. 112; *Treadwell v. Union Ins. Co.* 6 Cowen, R. 270.

⁴ *Saltus v. Ocean Ins. Co.* 12 Johns. R. 112; *Liddard v. Lopes*, 10 East, R. 526; *Treadwell v. Union Ins. Co.* 6 Cowen, R. 270; *Wilson v. Millar*, 2 Stark. R. 1; *Am. Ins. Co. v. Center*, 4 Wend. R. 52; *Freeman v. East India Co.* 5 Barn. & Ald. 617; *Abbott on Shipp.* p. 240, 241, 243, and notes.

⁵ *Pope v. Nickerson*, 3 Story, R. 465; *Jordan v. Warren Ins. Co.* 1 Story, R. 342; *Wilson v. Royal Ex. Assur. Co.* 2 Camp. N. P. R. 623; *Schieffelin v. New York Ins. Co.* 9 Johns. R. 21; *Saltus v. Ocean Ins. Co.* 12 Johns. R. 112.

⁶ *Clark v. Mass. Fire & Marine Ins. Co.* 2 Pick. R. 104; *Palmer v. Lorillard*, 16 Johns. R. 348.

left to the discretion of the master, as to reshipment or sale thereof; and the question is to be determined by the circumstances of each case, as it arises. It has, however, been laid down, that although the cargo be capable of being carried to its port of destination, yet if it be so much injured, or so susceptible of injury, that it will endanger the safety of the ship and cargo, or will greatly deteriorate, and be liable to be spoiled utterly, the master may sell it.¹

§ 375. Second; the master may sell a part of the cargo, when it becomes necessary in order to effect repairs upon the vessel, and to enable him to carry the residue forward.² But he cannot sell the *whole* cargo for such purpose, and thus put an end to the adventure.³ So, also, he may sell a part of the cargo for the purpose of furnishing necessaries to the ship, if he have no other funds available, — but not otherwise.⁴

§ 376. But a master of a vessel has no right to sell the cargo, or any portion of it, unless in case of a moral necessity, and in order to prevent a greater loss to the shippers; and in doing so, he must exercise a sound discretion. In case he is obliged to sell a part for the necessary repairs of the vessel, or for necessary equipments or furnishings, the owner would, if the sale were justifiable, be liable to the shipper to the full amount of the sales.⁵ If he sell the goods because of their perishable nature, and to prevent loss to the

¹ *Jordan v. Warren Ins. Co.* 1 Story, R. 342; *Pope v. Nickerson*, 3 Story, R. 465.

² *The Gratitude*, 3 Rob. Adm. R. 240; *Abbott on Shipp.* Part 2, ch. 3, § 8; *the Packet*, 3 Mason, R. 255; *Pope v. Nickerson*, 3 Story, R. 465.

³ *The Gratitude*, 3 Rob. Adm. R. 240; *Searle v. Scovell*, 4 Johns. R. 218; *Hunter v. Prinsep*, 10 East, R. 393; *Saltus v. Ocean Ins. Co.* 12 Johns. Ch. R. 107.

⁴ *Pope v. Nickerson*, 3 Story, R. 465.

⁵ *Ibid.*; and cases cited above.

shipper, he becomes agent, in so far, for the latter, and is liable for the proceeds.¹

§ 376 *a*. The master has a lien on the freight and on the cargo for all necessary disbursements for incidental expenses, and for all liabilities which he contracts for these expenses during the voyage.² If, therefore, having authority to purchase a cargo, he draw a bill making himself personally liable, and with the proceeds purchase a cargo, he has a lien thereon for his indemnity.³ So, also, he may retain freight to pay the seamen's wages.⁴ So, also, both master and owner have a lien on all merchandise for the freight due upon it.⁵ But a master has no remedy for his wages against the vessel,⁶ although it would seem in this country that he would have a lien on the freight therefor;⁷ but this point is not quite settled.

¹ *Pope v. Nickerson*, 3 Story, R. 465. See also cases cited above.

² *Drinkwater v. The Spartan*, Ware, R. 149; *Newhall v. Dunlap*, 2 Shep. R. 180; *Lane v. Penniman*, 4 Mass. R. 92; *Ingersoll v. Van Bokkelin*, 7 Cowen, R. 670.

³ *Newhall v. Dunlap*, 2 Shep. R. 180.

⁴ *Drinkwater v. The Spartan*, Ware, R. 149.

⁵ *Goodrich v. Lord*, 10 Mass. R. 487.

⁶ *Drinkwater v. The Spartan*, Ware, R. 149; *The Grand Turk*, 1 Paine, R. 73; *The New Jersey*, 1 Peters, Adm. R. 228; *The Ship Packet*, 3 Mason, R. 255; *The Steamboat Orleans*, 11 Peters, S. C. R. 175; 3 Kent, Comm. p. 166. See also Kinne's Law Compendium, vol. 1, title Law of Ships and Maritime Commerce, p. 627, and cases cited there.

⁷ *Drinkwater v. The Spartan*, Ware, R. 149; *Ingersoll v. Van Bokkelin*, 7 Cowen, R. 670; (but see s. c. 5 Wend. 315). See also *Shaw v. Gookin*, 7 N. Hamp. R. 19; *Lane v. Penniman*, 4 Mass. R. 91; *The Ship Packet*, 3 Mason, R. 255; *Millard v. Hallet*, 2 Caines, R. 77; *Lewis v. Hancock*, 11 Mass. R. 72; *Cowing v. Snow*, 11 Mass. R. 415.

CHAPTER XIV.

CHANGE OF PARTIES BY ASSIGNMENT.

§ 376 *b*. IN the next place, there may be a change of interest, duty, and responsibility between parties, growing out of an assignment of the old contract, or the novation or substitution of a new one,¹—and this we propose now to consider.

§ 376 *c*. By the old rule of the common law, the assignment of a chose in action was prohibited, on the ground that litigation would be thereby encouraged and suits multiplied.² The only admitted exception was in favor of the king, the policy of the rule not applying to him.³ Nominally the same doctrine still obtains at law, but practically it has lost all its force, and degenerated into a mere form, while in equity it is totally disregarded,⁴ and every *bonâ fide* assignment for a valuable con-

¹ Co. Litt. 232 (*b*), Butler's note.

² *Master v. Miller*, 4 T. R. 320; *Lampet's case*, 10 Co. R. 48 *a*; *Thalhimer v. Brinckerhoff*, 3 Cowen, R. 623. In Bacon's Abridgment, tit. Obligation A., it is stated, that "a bond is a chose in action, which cannot be assigned over, so as to enable the assignee to sue in his own name; yet he has, by the assignment, such a title to the paper and wax that he may keep or cancel it."

³ *Ibid.* *Stafford v. Buckley*, 2 Ves. R. 177, 181; *Breverton's case*, Dyer, R. 30 *b*; Co. Litt. 232 *b*, note 1.

⁴ *Gibson v. Cooke*, 20 Pick. R. 17. Mr. Justice Dewey, in this case says, "The doctrine of equitable assignments has been gradually extending to meet the convenience of trade and business, and has been favorably viewed in the courts of law, subject, however, to the legal principle, that in such cases the assignee can enforce his claim only in the name of the assignor, unless there

sideration is treated as a declaration of trust, conferring upon the assignee the same rights against the original debtor as the assignor himself would have had.¹

§ 376 *d*. The doctrine formerly obtained, that the instrument by which an assignment was made must be of as high a nature as the instrument assigned.² But this rule has been very much modified, if not quite overthrown, by the late cases, and it seems that the assignment of a contract may now be executed simply by a transfer of the evidence of the contract.³ But there must be an actual delivery, — and a bare agreement to deliver, without any actual or symbolical transfer of the evidence of the contract, would be insufficient. Thus, an indorsement on an instrument, directing a debtor to pay to a third person a portion of the amount due, would not be operative as an assignment, so long as the instrument remained in the hands of the creditor, although the debtor had notice of the indorsement.⁴

§ 376 *e*. The policy of courts of equity has been to uphold

be an express promise by the debtor to pay the assignee. Under this limitation, choses in action generally may be the subject of an assignment; and debts which are contingent, and money yet to become due, may well be assigned, these circumstances only operating to postpone the liability of the debtor until the contingency happens and the money becomes payable."

¹ Story's Eq. Jurisp. § 1040, 1055; *Langton v. Horton*, 1 Hare, R. 549; *Trull v. Eastman*, 3 Metcalf, R. 121; *Goring v. Bickerstaff*, 1 Ch. Cas. 8; 1 Madd. Ch. Prac. 437; 1 Fonbl. Eq., B. 1, ch. 4, § 2, and note *g*; Com. Dig. Chancery, 2 H. Assignment; *Duke of Chandos v. Talbot*, 2 P. Wms. 603; Story on Bills of Ex. § 199, 201.

² *Wood v. Partridge*, 11 Mass. R. 488; *Perkins v. Parker*, 1 Mass. R. 117; *Brewer v. Dyer*, 7 Cush. R. 338.

³ *Jones v. Witter*, 13 Mass. R. 304; *Dunn v. Snell*, 15 Mass. R. 481; *Ford v. Stuart*, 19 Johns. R. 342; *Tibbits v. George*, 5 Adolph. & Ell. 107; *Prescott v. Hull*, 17 Johns. R. 284; *Robbins v. Bacon*, 3 Greenl. R. 346; *Porter v. Ballard*, 26 Maine R. 448; *Vose v. Handy*, 2 Greenl. R. 322.

⁴ *Whittle v. Skinner*, 23 Verm. R. 531; *Palmer v. Merrill*, 6 Cush. R. 282.

and give effect to assignments in cases where they would not be supported at common law. No particular form is necessary in equity to constitute an assignment; any order, writing, or act by a creditor, which makes an appropriation of a fund belonging to him, in the hands of the debtor, being sufficient.¹ The order should, however, be direct upon the debtor or person holding the funds of the drawer; and an authority given to a person not privy to the contract to receive and pay over funds in the hands of the debtor, would not constitute a sufficient assignment in equity.² Thus, where A., the engineer of a railway company, being indebted to his banker, wrote to the solicitors of the company, authorizing them to receive the money due to him from the company, and requesting them to pay it over to the banker, and the solicitors, by letter promised the banker to pay him such money on receiving it, it was held, that the transaction did not constitute an equitable assignment of the debt, the solicitors not being privy to the contract, and that the letter of A. should have been to the company itself.³

¹ 2 Story, Eq. Jurisp. § 1043 to § 1047; *Row v. Dawson*, 1 Ves. R. 332; *Ex parte South*, 3 Swanst. R. 393; *Morton v. Naylor*, 1 Hill, N. Y. R. 583; *Clemson v. Davidson*, 5 Binn. R. 392; *Crowfoot v. Gurney*, 2 Moore & Scott, 473; *Ryall v. Rowles*, 1 Ves. R. 348; *Burn v. Carvalho*, 4 Mylne & Craig, R. 690.

² *Rodick v. Gandell*, 15 Eng. Law & Eq. R. 22, 28; *Garrard v. Lord Lauderdale*, 3 Sim. R. 1. See post, § 450 et seq.

³ *Rodick v. Gandell*, 15 Eng. Law & Eq. 22. In this case Lord Truro commented thus on the authorities:—"I think the case may properly be decided upon the main ground of equity made by the bill, that is, whether the letters relied upon constitute a valid equitable assignment of the debts due from the several railway companies mentioned in those letters, according to the law of this court, as pronounced by Lord Eldon, in *Ex parte South*, 3 Swanst. 392, and by Lord Cottenham in *Burn v. Carvalho*, 4 Myl. & Cr. 690.

"The law relied upon, on the part of the bank, as stated by Lord Eldon in the case of *Ex parte South*, is to the following effect,—"If a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him." The same law is thus pronounced by Lord Cottenham, in the case of *Burn v. Carvalho*:—"In equity an order given by a debtor to his creditor, upon a third person, having funds of the

§ 376*f*. Again, the assent of the debtor is not necessary in equity to give validity to the assignment,¹ but it is proper

debtor, to pay the creditor out of such funds, is a binding, equitable assignment of so much of the fund.'

"Numerous cases were cited during the argument, but they all seem to me to be to the same legal effect, although they vary in circumstances. It will, however, be necessary to advert to those cases, so far as to show that they do not extend the principle beyond what it was enunciated by Lord Eldon and Lord Cottenham, in any way bearing upon the case.

"The law, as stated by those learned judges, was not disputed upon the part of the defendants, who rested their defence upon the ground that the present case does not fall within that law.

"In *Ex parte South*, 3 Swanst. 392, the order was given by Jane Rowe to Alderson, her creditor, directed to the executor of a person indebted to Jane Row, and requiring the executor to pay the debt so owing to Jane Row to Alderson, her creditor.

"*Lett v. Morris*, 4 Sim. 607, was an order by a builder upon his customer and employer, directing such employer to pay the timber merchant the amount due to him for timber supplied for the work, out of the money which should become due to the builder in respect of the work he was doing.

"In *Yeates v. Groves*, 1 Ves. Jr. 280, Dawson sold certain premises to Groves & Dickenson, and he gave to Brown, his creditor, an order upon Groves & Dickenson, requiring them to pay Brown the amount due to him from Dawson, out of the purchase-money due from Groves & Dickenson to Dawson.

"*Crowfoot v. Gurney*, 2 Moore & Scott, 473, was the common case of an order directed to a debtor, and adopted and acted upon by him, directing him to pay the amount due from him to a creditor of the party giving the order.

"The other cases cited, which differ somewhat in their circumstances, do not extend the principle of the quoted decision.

"The case of *Burn v. Carvalho*, 4 Myl. & Cr. 690, is before cited; the facts were very simple: Fortunato gave to Burn, his creditor, an order upon Rego, his agent, who then held goods or money of his, Fortunato, in his hands, directing Rego to pay Burn his debt. So far, the case was of the most ordinary kind; but although Burn forthwith sent the order out to Rego, yet before it reached Rego, at Bahia, Fortunato became bankrupt, and Fortunato's assignees insisted that by reason that notice of the transaction had not reached

¹ *Ex parte South*, 3 Swanst. R. 393; *Spring v. So. Car. Ins. Co.* 8 Wheat. R. 268-282; *Bell v. London and North West. R. R. Co.* 21 Eng. Law and Eq. R. 96.

that notice of the assignment should be at once given to him, in order to save the rights of the assignee, in case of a *bonâ*

Rego before the act of bankruptcy by Fortunato, the goods or funds remained in the order and disposition of Fortunato as apparent owner at the time of the act of bankruptcy, and that under the provisions of the bankrupt statutes, the creditors were entitled to the goods free from the lien. Lord Cottenham held, that as Burn had sent out the order as soon as practicable, the goods could not be deemed, after the order was sent, to remain with the consent of Burn, who in law had become the true owner, in the order and disposition of Fortunato as apparent owner. That was the only point of difference in the decision at law and by the Chancellor, and which point in no respects bears upon the present case.

“The counsel for the bank stated they mainly relied upon the case of *Row v. Dawson*, 1 Ves. 331. The case is not very distinctly reported, and therefore I have inspected the registrar's books, and it appears that the question in that case was, whether Tonson and Cowdery (two persons who had respectively made advances to Gibson), or the assignees of Gibson, were entitled to receive a certain sum of money, then in the hands or under the control of Swinburne, the deputy controller of the exchequer; and the rights of the parties depended upon the effect of an order given by Gibson before his bankruptcy to Tonson and Cowdery, in consideration of present advances made by them. The order was in these terms, — ‘Out of the money due to me from Horace Walpole out of the exchequer, and what will be due at Michaelmas, pay to Tonson £400, and to Cowdery £200, value received.’ The order was immediately lodged with the officer of the Exchequer, Swinburne, but Gibson became bankrupt before the order was acted upon; and Gibson's assignees filed their bill, praying that the amount in Swinburne's hands might be paid to them, or if Tonson and Cowdery were entitled to priority, the residue might be paid to them. The Lord Chancellor held the document to be an assignment of the fund in the exchequer, of which the only practicable notice was given by service of the order upon the officer of the department, thus reducing the case to the ordinary position of an order upon a debtor or person having funds belonging to the giver of the order, requiring the debtor to pay the debt or fund to the creditor of such giver of the order. The illustrations adopted by the Lord Chancellor, manifest that he deemed the case to be of the ordinary description I have mentioned. He says, ‘Suppose an obligee receives the money on the bond, and writes on the back of it, “Whereas I have received the principal and interest from such an one, do you, the obligor, pay the money to him:” this is just that case.’ If the case of the bond, and the case before the court were identical, as the Lord Chancellor states, then the order, in both cases, was in substance directed to the debtor; and this case materially differs in the fact, that the order to Pinniger and

vide payment to the assignor, or subsequent assignee, without notice.¹ So, also, in equity, the assignee may sue in his own

Westmacott was not an order upon a debtor, or upon a person by whom the debt assigned would be paid; this is an essential difference in point of fact, and in the legal operation of the instrument. I do not discover that this case extends the principle upon which instruments of the nature of that under consideration have been held to operate as equitable assignments.

"Several cases were cited, which do not appear to me to have any material bearing upon the case. Among them was *Ex parte Scudamore*, 3 Ves. 85. A power of attorney was given in pursuance of a previous agreement between Shepherd and a creditor. Shepherd granted a power of attorney to Williams, his former partner, to collect partnership debts, and upon trust to pay the creditor out of Shepherd's share. The money was received by the attorney, and the assignees of Shepherd, who had become bankrupt, disputed the right of the creditor to receive the money from the attorney, according to the trust. No question was discussed, whether the trust in the power of attorney in favor of the creditor had the effect of assigning the debts to be collected; but the sole point in dispute was, whether the trust in the power of attorney, in favor of the creditor, was a fraudulent preference.

"In *Fitzgerald v. Stewart*, 2 Sim. 333; 2 Russ. & M. 457, the question was, whether the defendants ought to be held trustees for the plaintiff of the proceeds of certain West India consignments as security for an annuity, and contains nothing applicable to the present case.

"In *Gibson v. Minet*, 9 Moore, 31, Gibson gave to Mintern, his creditor, an order upon Minet, his debtor, to hold £400 at the disposal of Mintern, the creditor; and the only point discussed in the case was, whether the order under the circumstances was revocable.

"In *Garrard v. Lord Lauderdale*, 3 Sim. 1, the question was, whether an assignment to A. to collect certain debts, and to pay the proceeds to B., who was no party to the transaction, was an assignment of which B. could entitle himself to the benefit; it was held that he could not.

"The decision in the case of *Watson v. The Duke of Wellington*, 1 Russ. & Myl. 602, does not appear to me to favor the plaintiff's case. The only point decided was, that the letter given by the Marquis of Hastings to Colonel Doyle did not amount to a direction to pay, but was merely an intimation and

¹ *Stocks v. Dobson*, 19 Eng. Law and Eq. R. 96; *Rodick v. Gandell*, 15 Eng. Law and Eq. R. 31; *Foster v. Blackstone*, 1 Mylne & Keen, 297; *Timson v. Ramsbottom*, 2 Keen, R. 35; *Ward v. Morrison*, 25 Verm. (2 Deane), R. 593; *Meux v. Bell*, 1 Hare, Ch. R. 73; 2 Story, Eq. Jurisp. § 1047, § 1057; *Williams v. Thorpe*, 2 Simons, R. 257; *Jones v. Witter*, 13 Mass. R. 304.

name, and enforce payment directly against the debtor, making him as well as the assignor a party to the bill.¹

suggestion, leaving Colonel Doyle the full exercise of his discretion. So far as the case can be deemed to have any bearing upon the present case, it is rather adverse than favorable to the bank.

"Ex parte Smith, 6 Ves. 447, has really no bearing upon this case. Hartsink accepted bills upon the security of platina, and the question was, if the agreement between the original parties to the bill enured to the benefit of the indorsees of the bills, Hartsink, the acceptor, having become bankrupt, not paying the bills; and it was held that the indorsees were not entitled to enforce the lien.

"I believe I have adverted to all the cases cited, which can be considered as having any bearing upon the present case; and the extent of the principle to be deduced from them is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. It therefore becomes necessary to examine whether the letters in question come within the principle referred to.

"I think that a decision, that the authority to Pinniger & Westmacott contained in the letter dated 26th December, 1845, to receive the debt due from the railway companies, and to pay what should be received to the bank, operated as an assignment in equity of the railway debts, would be to extend the principle much beyond the warrant of the authorities; and I also think that the effect of such a decision upon the interest of persons giving orders of the like description might be very injurious, and would be contrary to the intention of the parties to the transaction. If an assignment of the debts had been intended, it would have been quite as easy for Gandel & Brunton to have directed the order to the railway companies as to Pinniger & Westmacott. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been adjusted, and some definite portion been adjusted and realized.

"The letter clearly does not fall within the terms of the principle stated by either Lord Eldon or Lord Cottenham, inasmuch as the order was neither upon a debtor of Gandell and Brunton, nor upon any one holding funds of

¹ 2 Story, Eq. Jurisp. 1057; Ex parte South, 3 Swanst. R. 393; Lett v. Morris, 4 Sim. R. 607; Smith v. Everett, 4 Brown, Ch. R. 64; Tiernan v. Jackson, 5 Peters, R. 598.

§ 376 *g*. Courts of equity will also support assignments not only of choses in action actually existing, but also of possibilities and expectancies and contingent rights and interest, not ordinarily assignable at law, provided the transaction be fair, and not contrary to public policy.¹ For instance, an assign-

Gandell & Brunton, nor, as regarded Pinniger & Westmacott, was there any subject-matter upon which the order could presently attach. It was a mere authority to receive, which might or might not be acted upon; it was not directed to the railway companies, nor to any officer or representative of any of the companies, in any sense to make it available against the companies, who might have paid Gandell & Brunton, or any attorney or agent appointed by them, or have arranged for time to pay, or have compromised or compounded at their discretion."

¹ *Field v. The Mayor, &c. of New York*, 2 Selden, (N. Y.) R. 179; *Lett v. Morris*, 4 Sim. R. 607; *Emery v. Lawrence*, 8 Cushing, R. 151; *Commercial Bank v. Colt*, 15 Barb. R. 506; *Stocks v. Dobson*, 19 Eng. Law & Eq. R. 97. Mr. Justice Story, in *Mitchell v. Winslow*, 2 Story, R. 638, thus states the rule: — "It may be admitted to be true, what, indeed, seems to be the result of the authorities cited at the bar, as well as of others equally entitled to respect, that to make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment; and that a mere possibility is not assignable; although, perhaps the doctrine may require some qualifications under special circumstances, as, for example, in cases of the assignment of freight in the course of earning at the time of the assignment, as is shown in the case of *Leslie v. Guthrie* (Bing. New Cas. 697, 708, 709). But this admission will carry us but a very little way in the present case. For here the true question is, not whether the assignment of the property to be acquired *in futuro*, is good at law, but whether it is good in equity; for if it be, then, independently of any fraud (which is not pretended), as the assignee can take only what the bankrupt had a title to, subject to all equities, it follows, as a matter of course, that the petitioner (the assignee) has no claim, on which he can found himself for relief under his petition. So that the question is, in reality, narrowed down to the mere consideration of this, whether the present mortgage as to the future machinery, tools, and stock in trade, to be put into the factory (for there is no controversy as to those *in esse* at the time of the assignment) is valid or not against the mortgagor.

"Upon the best consideration, which I am able to give the subject, I think it is good and valid. Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed and *in esse*. On the contrary, they support assignments, not

ment of freight to be earned in future, or an order to pay over the amount which is to be the compensation for future work

only of choses in action, but of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true, that the assignment can have no positive operation to transfer, *in presenti*, property in things not *in esse*; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come *in esse*; and it may be enforced as such a contract *in rem*, in equity. Lord Hardwicke, in *Wright v. Wright* (1 Ves. R. 409, 411), expressly recognized this doctrine, and said, that an assignment of a contingent interest or possibility of an inheritance was equally allowable with an assignment of a possibility of a personal thing or chattel real. And he added, 'An assignment always operates by way of agreement or contract, amounting, in the consideration of this court, to this, that one agrees with another to transfer, and make good that right or interest, which is made good here by way of agreement.' In the very case then before him, he admitted, that the assignor had no immediate claim or demand, but a mere possibility in the property assigned, and that it was well assigned by the word 'claim,' which well described it, *in presenti* and *in futuro*. He also relied on the case of *Beckley v. Newland* (2 P. Will. 182), which (he said) was an agreement on marriage to settle all such lands as came to the party by descent or otherwise from his father; and it was carried into effect by the court, notwithstanding an expectancy of an heir at law is less than a possibility. The case of *Beckley v. Newland* (2 P. Will. 182), was not exactly as stated by Lord Hardwicke. But it was an agreement between two survivors, who had married two sisters, to divide equally between them whatever should be left to them by the father of their wives. But the principle was the same. The case of *Hobson v. Trevor* (2 P. Will. 191), was that probably in Lord Hardwicke's mind. See also 2 Story, Eq. Jurisp. 1040 *b* and note, and *Hobson v. Trevor*, (2 P. Will. R. 191), was fully to the same effect. In *Carleton v. Leighton* (3 Meriv. R. 667), Lord Eldon is said to have held, that the expectancy of an heir, presumptive or apparent, was not an interest or possibility, nor was capable of being made the subject of assignment or contract. But there is some reason to doubt the accuracy of the language as to assignment or contract; for he is reported immediately to have added, that the cases cited (referring to the cases of *Beckley v. Newland*, and *Hobson v. Trevor*), were cases of covenant to settle or assign property, which should fall to the covenantor; where the interest, which passed by the covenant, was not an interest in the land, but a right under the contract. This is strictly true, but still the contract was obligatory and sufficient to enforce a specific performance thereof. In the case of *Carleton v. Leighton*, the sole question

and labor to be done, or materials to be furnished, will be enforced in equity.¹ So, also, an assignment may be made of a

was, whether the mere expectancy of an heir, who became bankrupt, passed by the assignment of the commissioners. Lord Eldon held, that it did not; for it was not an interest or even a possibility in the land. It seems clear, that the language of Lord Eldon ought to receive some modification from other language used by him on other occasions. Thus, in *Lord Dursley v. Fitzhardinge* (6 Ves. 260, 261), he expressly admitted, that an heir or the next of kin might enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate; for the law would frame an interest in respect of the contract. Again, *In re, The Ship Warre* (8 Price, R. 269, note), in reference to the doctrine of Lord Ellenborough in *Robinson v. Macdonnell* (5 M. and Selw. 228), Lord Eldon said, that he should find it extremely difficult to say, that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings for ever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title, till that debt should be paid. Again, in *Curtis v. Auber* (1 Jacob & Walk. 526, 531), where an assignment was made of the present and future earnings of a ship, Lord Eldon supported it, and said: — 'In one case I think it was held, that although you might assign the wool then growing on the backs of the sheep, you could not assign the future fleeces. But still it was a good equitable assignment, and rendered the future earnings liable in equity.'

"The same doctrine was maintained by Mr. Vice-Chancellor Shadwell, in *Douglas v. Russell* (4 Simons, R. 524), and his decree was afterwards affirmed by the Lord Chancellor (1 Mylne & Keen, R. 488), upon appeal, as to an assignment of freight earned and to be earned on an outward and homeward voyage, then about to be undertaken. And it was acted upon and supported in a like assignment of freight to be earned on a particular voyage in the case of *Leslie v. Guthrie*, (1 Bing. New Cases, 697, 708, 709), where the whole subject was argued at large, in a suit of the assignees under a bankruptcy.

"But the latest case, and certainly one of the most important and satisfactory in its reasoning, as well as its conclusion, is that of *Langton v. Horton* (1 Hare, Rep. 549), before Mr. Vice-Chancellor Wigram. There, a deed of assignment by way of mortgage was made of a whale ship, and her tackle and appurtenances, and all oil and head-matter and other cargo, which might be

¹ Ibid. *Leslie v. Guthrie*, 1 Bing. N. C. 697.

whale ship by way of mortgage, and of all oil, head-matter, and other cargo, which may be caught and brought home on a

caught and brought home in the ship on and from her then present voyage; and the question arose between an execution creditor of the assignor, and the assignee, whether the assignment was good as to the future cargo obtained in the voyage after the assignment. The learned Vice-Chancellor decided, that it was. Upon that occasion he said: 'Is it true, then, that a subject to be acquired after the date of a contract, cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title, I do not now advert to; but cases recognizing the general proposition are of common occurrence. A tenant, for example, contracts that particular things, which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a court of equity will enforce such contracts, where they are founded on valuable consideration, and justice requires, that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold, which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies, in terms, to implements, which shall be there at the time specified; and here neither construction nor decision has confined it to those articles, which were on the property at the time the lease was granted.

"But it is not necessary that I should refer to such cases as these, for Lord Eldon, in the case of the ship *Warre* (8 Price, 269, n.), and in *Curtis v. Auber* (1 J. & W. 526), has decided all that is necessary to dispose of the present argument. Admitting that those cases are not specifically, and in terms, like the principal case, they are not of the less authority for the present purpose; for they remove the difficulty, which has been raised in argument, and decide that non-existing property may be the subject of valid assignment.

"I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of £5,000 to pay the crew and furnish an outfit, and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred

whaling voyage.¹ Nor is it necessary, that the fund assigned be of a definite or ascertained amount. But it has been laid down that where an equitable interest is assigned, in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to upset a legal instrument.²

§ 376 *h*. Again, in equity, a valuable consideration is not now held to be necessary to support an assignment, provided the instrument of assignment be complete in form, — on the ground that a trust is created thereby, which is to be distinguished from a merely voluntary contract.³ But a mere agreement or executory instrument of conveyance, would not be valid as an assignment, without consideration, for a court of equity will not interpose to assist mere volunteers.⁴

§ 376 *i*. At law, the doctrines are by no means so liberal in

to, that a court of equity, upon a contract so framed, would hold, that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage, the whales taken, or the oil obtained, shall be his security for the amount of his advances. I cannot, without going in opposition to many authorities, which have been cited, throw any doubt upon the point, that *Birnie*, the contracting party, would be bound by the assignment to the plaintiffs.'

"Now, it seems to me, that this reasoning is exceedingly cogent and striking; and it stands upon grounds entirely satisfactory and conclusive upon the whole subject."

¹ *Mitchell v. Winslow*, 2 Story, R. 630; *Langton v. Horton*, 1 Hare, R. 549.

² Per Lord Abinger in *Prosser v. Edmonds*, 1 Younge & Coll. 496; 2 Story, Eq. Jurisp. § 1040 *g*.

³ *Kekewich v. Manning*, 12 Eng. Law and Eq. R. 120; Lord Eldon in *Pulvertoft v. Pulvertoft*, 18 Ves. R. 84; *Ex parte Pye*, 18 Ves. R. 140; *Denison v. Gochring*, 7 Barr, R. 179; *Nesmith v. Drum*, 8 W. & S. 10.

⁴ *Ibid.* *Kennedy's Exr's v. Ware*, 1 Barr, R. 450.

cases of assignment, although the differences are in most respects merely formal. The assent of the debtor is absolutely required at law in order to enable the assignee to bring an action in his own name against him;¹ and a mere order on him to pay over to a third person the funds of the drawer in his hands, will be insufficient until it is accepted.² There are, however, certain exceptions which obtain in favor of negotiable instruments, and which are created by the policy of the law, to answer the demands of public convenience.³ If, therefore, a contract be negotiable and payable to order, it may be assigned by mere indorsement; and if it be payable to bearer, a simple delivery constitutes a sufficient assignment.⁴ But the mere delivery of a note or bill payable to order, without indorsement,

¹ *Tibbits v. George*, 5 Adolph. & Ell. 115; 2 Story, Eq. Jurisp. § 1041; *Stocks v. Dobson*, 19 Eng. Law & Eq. R. 97; *Meux v. Bell*, 1 Hare, R. 73; *Coolidge v. Ruggles*, 15 Mass. R. 387; *Usher v. De Wolf*, 13 Mass. R. 290; *Williams v. Everett*, 14 East, R. 582; *Yates v. Bell*, 3 Barn. & Ald. 643; *De Barnales v. Fuller*, 14 East, R. 590, note; *Mandeville v. Welch*, 5 Wheat. R. 277; *Tiernan v. Jackson*, 5 Peters, R. 597; *Adams v. Claxton*, 6 Ves. R. 231; *Scott v. Porcher*, 3 Meriv. R. 662; *Jessel v. Williamsburgh Ins. Co.* 3 Hill, R. 88; *Gibson v. Cooke*, 20 Pick. R. 17. See post, § 450.

² *Ibid.* *Gibson v. Cooke*, 20 Pick. R. 15; *Robbins v. Bacon*, 3 Greenl. R. 346; *Mandeville v. Welch*, 5 Wheat. R. 277. In *Gibson v. Cooke*, Mr. Justice Dewey says: "An order or draft for a part only of the liability or debt of the drawee, does not, against his consent, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignor for the whole or any part of the sum due from the debtor; and the reason of this rule is, that a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire."

³ *Gibson v. Cooke*, 20 Pick. R. 17; *Robbins v. Bacon*, 3 Greenl. R. 346.

⁴ *Fenner v. Meares*, 2 W. Bl. 1269; *Israel v. Douglass*, 1 H. B. 239; *Mowry v. Todd*, 12 Mass. 283; *Jones v. Witter*, 13 Mass. 307; *Crocker v. Whitney*, 10 Mass. 319; *Coolidge v. Ruggles*, 15 Mass. 388; *Lampet's case*, 10 Co. R. 48, a; *Thalheimer v. Brinckerhoff*, 3 Cowen, R. 623; *Com. Dig. Assignment, D.*; *Tiernan v. Jackson*, 5 Peters, R. 597; *Williams v. Everett*, 14 East, 582; *Crowfoot v. Gurney*, 9 Bing. 372; *Hodgson v. Anderson*, 3 Barn. & Cres.

is not sufficient.¹ There may also be cases where the assent of the debtor might be implied from the nature of the transaction, — as where property is delivered by a bailee to B. for the use of C., or to be delivered to C., in which case the acceptance of the bailment might be treated as equivalent to an express promise to comply with the terms of the bailment, so as to render any further assent unnecessary.² But it seems doubtful, whether if there be no express promise or act by the bailee, he would be held to be responsible at law to any person but the bailor,³ though he undoubtedly would in equity.⁴ If, how-

842; *Baron v. Husband*, 4 Barn. & Adolph. 611; *Mandeville v. Welch*, 5 Wheat. R. 277.

¹ *Freeman v. Perry*, 22 Conn. R. 617; *Hedges v. Sealy*, 9 Barb. R. 214.

² Story on Bailments, § 103; *Israel v. Douglass*, 1 H. Black. R. 242; *Farmer v. Russell*, 1 Bos. & Pul. 296; *Priddy v. Rose*, 3 Meriv. R. 86, 102.

³ *Williams v. Everett*, 14 East, R. 582; *Tiernan v. Jackson*, 5 Peters, R. 597; *Pigott v. Thompson*, 3 Bos. & Pul. 149, and note (a); *Martyn v. Hind*, Cowp. R. 437; *Llily v. Hays*, 5 Adolph. & Ell. 548; *Ex parte South*, 3 Swaust. 393. Mr. Justice Story (2 Eq. Jurisp. § 1041) says: "In the common case where money or other property is delivered by a bailor to B. for the use of C., or to be delivered to C., the acceptance of the bailment amounts to an express promise from the bailee to the bailor, to deliver or pay over the property accordingly. In such a case, it has been said, that the person, for whose use the money or property is so delivered, may maintain an action at law therefor against the bailee, without any further act or assent on the part of the bailee; for a privity is created between them by the original undertaking. But of this doctrine some doubt may perhaps be entertained, unless there is some act done by the bailee, or some promise made by him, whereby he shall directly contract an obligation to such person to deliver the money or other property over to him; otherwise it would seem, that the only contract would be between the bailor and his immediate bailee." In his note to this passage he adds: "There is certainly some confusion in the cases in the books on this subject. Lord Alvanley, in *Pigott v. Thompson*, 3 Bos. & Pul. 149, seems to have thought, that if A. lets land to B., in consideration of which B. promises to pay the rent to C., the latter may maintain an action on that promise. But he said, that his brothers thought differently. So in *Marchington v. Vernon*, cited in 1 Bos. & Pul. 101, note; Mr. Justice Buller is re-

⁴ 2 Story, Eq. Jurisp. § 1011; *Stocks v. Dobson*, 19 Eng. Law & Eq. R. 97; s. c. 17 Jur. 539; *Meux v. Bell*, 1 Hare, R. 73.

ever, the debtor have notice of the assignment, and assent to it, and promise to pay the assignee, a privity of contract is created between the two parties, and the assignee may sue in his own name;¹ but otherwise he must bring his action in the name of the assignor,² or if the assignor be dead, in the name of his executor or administrator.³

§ 376*j*. Again, an assignment will not, ordinarily, be valid at law, unless the subject of it have an existence actual or potential, at the time of the assignment.⁴ Mere possibilities, expectancies, or contingent rights and interests are not assignable at law, unless in special cases where they are coupled with some present interest, and pass by way of release, estoppel, or fine.⁵ It would seem, however, that the assignment

ported to have said, that if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it. Probably it will be found, upon a thorough examination of the cases, that the true principle, on which they have proceeded, is, that, where the promise is construed to be made to A., for the use or benefit of B., A. alone can maintain an action thereon. But, if there is promise in general terms, which may be construed to be made to B. through A., there B. may maintain an action thereon. The cases of *Williams v. Everett*, 14 East, 582, and *Tiernan v. Jackson*, 5 Peters, R. 597, 601, contain the fullest expositions of the doctrine."

¹ *Tibbits v. George*, 5 Adolph. & Ell. 115; *Crocker v. Whitney*, 10 Mass. R. 316; *Mowry v. Todd*, 12 Mass. R. 281; *Warren v. Wheeler*, 21 Maine R. 484; *Ford v. Adams*, 2 Barb. Sup. Ct. 349; *De Bernales v. Fuller*, 14 East, R. 590, note; *Mandeville v. Welch*, 5 Wheat. R. 227; *Barrett v. Union M. F. Ins. Co.* 7 Cushing, R. 175; *Hodges v. Eastman*, 12 Verm. R. 358; *Barger v. Collins*, 7 Harris & Johns. 213.

² *Jessel v. Williamsburgh Ins. Co.* 3 Hill, R. 88; *Cooledge v. Ruggles*, 15 Mass. R. 387; *Stocks v. Dobson*, 19 Eng. Law & Eq. R. 97; s. c. 17 Jur. 539.

³ *Dawes v. Boylston*, 9 Mass. R. 337; *Cutts v. Perkins*, 12 Mass. R. 206.

⁴ *Mitchell v. Winslow*, 2 Story, R. 338; *Langton v. Horton*, 1 Hare, R. 549; *Robinson v. MacDonnell*, 5 Maule & Selw. 228; *Lunn v. Thornton*, 1 Mann. Gr. & Scott, 379; *Moody v. Wright*, 13 Met. 17; *Petch v. Tutin*, 15 Mees. & Welsb. 110.

⁵ 2 Story, Eq. Jurisp. § 1040; *Arthur v. Bokenham*, 11 Mod. R. 152; *Doe d. Christmas v. Oliver*, 10 Barn. & Cres. 181; *Weale v. Lower*, Pollexf. R. 54;

of freight, in the course of earning, would be supported at law.¹

§ 376 *k*. Courts of law, however, now follow the doctrine of equity, as far as possible, without infringing upon established principles of common law; and the beneficial interest of the assignee is so far protected, that the defendant may set off a debt due to the assignee in like manner, as if the suit had been brought in his name.²

§ 376 *l*. Where the assignment is perfected by the assent of the debtor, the assignee stands in place of the assignor. He is entitled to all his remedies and is subject to all the equities between him and his debtor. And the debtor on his part may avail himself of all the equitable defences he would have had against the assignor, and to none other.³

§ 376 *m*. Where there is no fraud, and the subject-matter of the assignment is not created by the assignor, as in the case of a warehouse receipt, bond, or charter-party of a third person, it is the duty of the assignee to make inquiries in respect to it; and the original maker of the security is not bound to volunteer information.⁴ But if the assignee so give notice of the assignment as to induce a belief that he has been deceived, the creator of the security is bound to inform him of the real circumstances, and unless he do, he cannot be allowed to

Fearne on Writing, Rem. ch. 6, § 5, p. 363; *Bensley v. Burdon*, 2 Sim. & Stew. 519.

¹ *Leslie v. Guthrie*, 1 Bing. N. C. 697, 710.

² *Corser v. Craig*, 1 Wash. C. C. R. 424.

³ *Mitchell v. Winslow*, 2 Story, R. 630; *Priddy v. Rose*, 3 Meriv. R. 86; *Coles v. Jones*, 2 Vernon, R. 692; *Murray v. Lylburn*, 2 Johns. Ch. R. 441; *Mangles v. Dixon*, 18 Eng. L. & Eq. R. 82; *Bartlett v. Pearson*, 29 Maine R. 9; *Commercial Bank v. Colt*, 15 Barb. R. 506; *Sanborn v. Little*, 3 New Hamp. R. 539; *Wood v. Partridge*, 11 Mass. R. 488; *Willis v. Twombly*, 13 Mass. R. 204; *Green v. Darling*, 5 Mason, R. 201.

⁴ *Mangles v. Dixon*, 18 English Law & Eq. R. 82.

take advantage of the equities between the assignor and himself, where they operate as an injury to the assignee.¹ If, however, the assignee have sufficient notice to put him on inquiry, it is the same as if full notice were given him of any fraud, which he might on inquiry have discovered.²

§ 376 *n*. After notice of the assignment has been given, the equitable interest of assignees is protected in courts of law against all interference of the original parties.³ If, therefore, the assignment be in good faith and for a valuable consideration, neither the bankruptcy of the assignor nor his release will defeat the action of the assignee, although it be brought in the name of the assignor.⁴ And if a bond be assigned, the courts will set aside a release given by the obligee after notice to the obligor of the assignment, and prevent him from fraudulently interfering to defeat the action.⁵

§ 376 *o*. Assignments that are *illegal or against public policy* will be sustained neither at law nor in equity. An assignment, therefore, by an officer in the army or navy of his pay,⁶ or of his commission,⁷ or by a judge of his salary;⁸ or an as-

¹ Ibid.

² *Commercial Bank v. Colt*, 15 Barbour, R. 506.

³ *Dunklee v. Greenfield S. Mill Co.* 3 Foster, N. Hamp. R. 245; *Alner v. George*, 1 Camp. R. 392.

⁴ *Dix v. Cobb*, 4 Mass. R. 508; *Brown v. Maine Bank*, 11 Mass. R. 153; *Winch v. Keeley*, 1 T. R. 619; *Blake v. Buchanan*, 22 Verm. R. 548; *Webb v. Steele*, 13 N. Hamp. R. 230. See post, § 523, et seq., as to assignments in fraud of creditors.

⁵ *Alner v. George*, 1 Camp. R. 392.

⁶ *Flarty v. Odlum*, 3 T. R. 681; *Wells v. Foster*, 8 Mees. & Welsb. 149; *Davis v. Duke of Marlborough*, 1 Swanst. R. 79; *Stone v. Lidderdale*, 2 Anst. R. 533; 2 Story, Eq. Jurisp. § 1040 d to 1040 f; *Grenfell v. Dean & Canons of Windsor*, 2 Beav. R. 544; *McCarthy v. Goold*, 1 Ball & Beat. 387.

⁷ *Collyer v. Fallon*, Turn. & Russ. 459.

⁸ *Flarty v. Odlum*, 3 T. R. 681. But in *Brackett v. Blake & Tr.* 7 Met. R. 337, it is held, that an assignment of a salary may be made, so as to prevent its attachment upon trustee process. See also *Chandler v. Parker*, cited in the same case, p. 337.

signment, which savors of maintenance;¹ or the assignment of a right of action for personal tort,² or of a right to file a bill in equity for a fraud;³ will not be supported. Within this class, are included assignments of contracts for champerty and maintenance, which are considered in a subsequent part of this treatise.⁴ But where a chattel has been wrongfully converted, the owner may sell it so as to give the vendee a right of action in his own name against the wrongdoer.⁵

§ 376 *p.* The assignee of a debt or chose in action, which is a mere legal demand, will not ordinarily be entitled to relief in a court of equity, where his remedy is complete at law; and he must in such cases bring his action at law in the name of the assignor.⁶ But if there be any special circumstances which render the action at law inappropriate or incomplete, a suit in equity will be sustained.⁷ If, therefore, the assignor refuse to allow the action at law to be brought in his name, and especially if any act be done by him to prevent the assignee from recovering in a suit at law in his name,

¹ *Prosser v. Edmonds*, 1 Young & Coll. 481, 496.

² *Comegys v. Vasse*, 1 Peters, R. 193; *Gardner v. Adams*, 12 Wend. R. 297; *Commonwealth v. Fuqua*, 3 Litt. R. 41.

³ *Prosser v. Edmonds*, 1 Young & Coll. 481; *Morrison v. Deaderick*, 10 Humph. R. 342.

⁴ See post, § 578, § 581.

⁵ *Hall v. Robinson*, 2 Comst. R. 293.

⁶ *Dhegetoft v. London Ins. Co.*, Mosely, R. 83; *The Ontario Bank v. Mumford*, 2 Barb. Ch. R. 597, 615; *Carter v. United Ins. Co.* 1 Johns. Ch. R. 463; *Hammond v. Messenger*, 9 Sim. R. 327; *Mosely v. Boush*, 4 Rand. R. 392; *Adair v. Winchester*, 7 Gill & Johns. 114; *Smiley v. Bell*, Mart. & Yerg. R. 378; *Gover v. Christie*, 2 Har. & Johns. 67; but see contra, *Townsend v. Carpenter*, 11 Ohio, 21; *Winn v. Bowles*, 6 Munf. R. 23; *Young v. Parson's Admr.* 2 Hayw. 223; 2 Story on Equity Jurisp. § 64 (i), § 1057 a, § 1057 b; *Kemp v. Pryor*, 7 Ves. 249.

⁷ *The Ontario Bank v. Mumford*, 2 Barb. Ch. R. 597, 600, 615; *Lenox v. Roberts*, 2 Wheat. R. 373; *Riddle v. Mandeville*, 5 Cranch, R. 322; *Hammond v. Messenger*, 9 Sim. R. 327.

relief' will be granted in equity.¹ So, also, if the action at law be circuitous, and indirect, as in the case of the holder of a promissory note who seeks payment of a remote indorser, he might bring his suit in a court of equity.² But if the circumstances of the case be such that a court of equity does not possess as ample and appropriate means to administer justice as a court of law, — as if they involve questions of damages, which are properly for a jury to determine, — the assignee would be compelled to bring his action at law.³ It is only when there are obstacles to the remedy at law that chancery will lend its aid.

§ 376 *q*. Where a chose in action is assigned to the government, no express promise is necessary from the original debtor, to enable the government to sue in its own name.⁴ But where a claim, barred by the statute of limitations, is assigned to the government, it acquires no new validity thereby.⁵

¹ *Hammond v. Messenger*, 9 Sim. R. 327; *Ontario Bank v. Munford*, 2 Barb. Ch. R. 597.

² *Riddle v. Mandeville*, 5 Cranch, R. 330; per Ch. J. Marshall.

³ 2 Story, Eq. Jurisp. § 1057 b. See also *Dhegetoft v. London Assur. Co.*, Mosely, R. 83; *Carter v. U. S. Ins. Co.* 1 Johns. Ch. R. 463.

⁴ Bac. Abr. Prerogative, 2, 3; Cro. Jac. 180. See also *United States v. Buford*, 3 Peters, S. C. R. 13.

⁵ *United States v. Buford*, 3 Peters, S. C. R. 13.

CHAPTER XV.

CHANGE OF PARTIES BY NOVATION OR SUBSTITUTION.

§ 376 *r.* THE term novation, which is borrowed from the Roman law, signifies the substitution, with the agreement of all parties concerned, of one debt for another, or of one party for another. By the Roman law the contract was only termed *novatio*, when between the same parties a new engagement was substituted for the old one; but where a new party was introduced and substituted for debtor or creditor, the contract bore the name of *ex promissio*. The English term novation, which seems now to be coming in use, comprehends both forms.

§ 376 *s.* There are two modes by which a novation of parties may take place. First, where, by agreement between all parties, a new debtor intervenes, and assumes the debt, in which case the old debtor is discharged; and second, where a new creditor intervenes to whom the same debtor agrees to pay the debt, in which case the new creditor acquires all the rights of the former creditor. In both of these cases the same rules of law apply; and the substituted contract completely extinguishes the previous one. Thus, "if A. owes B. £100, and B. owes C. £100, and the three meet and it is agreed between them that A. should pay C. the £100, B.'s debt is extinguished and C. may recover that sum against A."¹ So, also, where the defendant having purchased a wagon of the plaintiff sold

¹ Tatlock v. Harris, 3 T. R. 180; per Mr. Justice Buller.

it immediately afterwards to C., and all the parties having met together, it was agreed between them, that C. should pay to the plaintiff the price of the wagon, it was held that the debt due from the defendant to the plaintiff was thereby extinguished.¹ So, also, where the plaintiffs were creditors and the defendants were debtors to Taillasson & Co., and by consent of all parties an arrangement was made that the plaintiffs should take the defendants as their debtors instead of Taillasson & Co., it was held, that the plaintiffs were entitled to recover on a count for money had and received against the defendants, the original debt having been extinguished.²

§ 376 *t.* This contract bears a strong affinity to an executed assignment with consent of the debtor, but in order to avoid the operation of the legal rule, that a chose in action is not assignable so as to give the assignee a right of action in his own name, it is treated as a new contract, the consideration of which is, the convenience resulting from the substitution of new parties;—the distinction being between the assignment of an old contract and the inception of a new one. In order, therefore, to constitute a strict novation, as the contract is understood in the civil and Roman law, it is necessary that there should be an express assent of all parties, an express promise and acceptance between the new parties, and an entire relinquishment of all claim on, or responsibility to the original creditor. It would not be a pure novation so long as the original creditor had any authority over the subject-matter, or either party had any claim on him, or responsibility to him.³ In the

¹ *Heaton v. Angier*, 7 N. Hamp. R. 397.

² *Wilson v. Coupland*, 5 Barn. & Ald. 228. See also *Thompson v. Percival*, 5 Barn. & Adolph. 925; *Evans v. Drummond*, 4 Esp. N. P. C. 89; *Reed v. White*, 5 Esp. N. P. C. 122. In these cases the debtor was accepted by the drawee as solely responsible. See also *Butterfield v. Hartshorn*, 7 N. Hamp. R. 345; *Wharton v. Walker*, 4 Barn. & Cres. 163. See post, 450.

³ In Justinian Institutes it is said, (Lib. 3, tit. 30, § 3,) “Solum novationem prioris obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit,

examples just given it will be observed, that the ground of the decision was the entire extinguishment of the original debt.

§ 376 *u*. It is manifest that a strict novation but rarely takes place, although contracts in the nature of novations are of frequent occurrence in the English law. Within this term all drafts or orders for the payment of money or transference of merchandise to extinguish a debt, may, with a little latitude, be considered to fall, as, though not answering to the exact definition, they are, in many cases, subject to the same rules as govern novations. Where an order, drawn by a creditor on his debtor, in favor of a third person, to pay over any amount in his hands belonging to the debtor, is accepted by all parties, it operates, ordinarily, as a conditional extinguishment of the debt, in case the order is actually complied with.¹ It may, however, be specially accepted by the third person as an absolute payment of his debt, in which case the contract is a pure novation.

§ 376 *v*. In respect to the rights and liabilities of parties where an order or draft upon a debtor is given in favor of a third person, the decisions are extremely conflicting. In a considerable number of cases it has been held, that the mere assent of the debtor on whom the order is drawn and an indorsement or transference by him on his books of the amount in favor of the third person, is sufficient to destroy the right of the original creditor to revoke the order, and to appropriate the sum to the third person.² But this has been

quod propter novationem prioris obligationis convenerunt; alioqui et manere pristinam obligationem et secundam ei accedere."

¹ *Cuxon v. Chadley*, 3 Barn. & Cres. 591; Post, § 979, § 980.

² This doctrine was held in *Weston v. Barker*, 12 Johns. R. 281, (Spencer, J., dissenting); *Neilson v. Bright*, 1 Johns. Cas. 205; *Israel v. Douglas*, 1 H. Black. R. 239, (spoken of with disapprobation in *Taylor v. Higgins*, 3 East, R. 169, and *Johnson v. Collings*, 1 East, R. 98); *Ward v. Evans*, 2 Lord Raym. R. 928; *Fenner v. Meares*, 2 Black. R. 1269; *Surtees v. Hubbard*, 4 Esp. R. 203; *Hall v. Marston*, 17 Mass. R. 575; *Gibson v. Minet*, 2 Bing. R. 7.

strenuously denied in nearly all the more modern English cases, and it has been repeatedly affirmed that the assent of all the parties is necessary to create such a privity of contract as would entitle the third person to recover, and would disable the drawer of the order from revoking it; and the ground of this rule is, that until the debtor and third person have assented to and interchanged promise and acceptance, the debtor is the mere mandatee of the drawer.¹ A stricter doctrine has, however, been asserted in several cases, in which it has been held, that not only the assent of all parties is required, but

¹ *Scott v. Porcher*, 3 Meriv. R. 652; *Crowfoot v. Gurney*, 2 Moore & Scott, 473, 480; *Hodgson v. Anderson*, 3 Barn. & Cres. 842; *Williams v. Everett*, 14 East, R. 582; *Yates v. Bell*, 3 Barn. & Ald. 643; *Mowry v. Todd*, 12 Mass. R. 284; *Meert v. Moessard*, 1 Moore & Payne, 11; *Gibson v. Cooke*, 20 Pick. R. 15; *Owen v. Owen*, 4 Car. & Payne, 93. In this case A. gave a sum of money into the hands of B. to pay to C., and it was ruled by Lord Tenterden, in an action against B. by A. to recover the money, that unless C. had consented to look to B. for the payment of that sum, A. was entitled to recover. In *Baron v. Husband*, 4 Barn. & Adol. 613, Lord Denman says: "The defendant received the money as the agent of the assignees and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them until he entered into some binding engagement with the plaintiff to hold it for his use. As soon as that engagement was entered into, and not until then, he would hold the money to the plaintiff's use. This is the doctrine laid down in *Williams v. Everett*, 14 East, 582; *Wharton v. Walker*, 4 Barn. & Cres. 163; *Scott v. Porcher*, 3 Meriv. R. 652; *Wedlake v. Hurley*, 1 Cro. & Jer. 83." See also *Maxwell v. Jameson*, 2 Barn. & Ald. 55; *Drake v. Mitchell*, 3 East, R. 251; *Walker v. Rostron*, 9 Mees. & Welsb. 418, 420; *Robertson v. Fauntleroy*, 8 Moore, R. 10; *Carvalho v. Burn*, 1 Ad. & E. 883; *Fairlie v. Denton*, 8 Barn. & Cres. 395; *Enthoven v. Hammond*, 22 Eng. Law & Eq. R. 476; *Barlow v. Browne*, 16 Mees. & Welsb. 126. In *Maxwell v. Jameson*, 2 Barn. & Ald. 55, one of the makers of a joint and several promissory note, after it had become due, gave his bond to the holder for the amount, but before the commencement of the action no money was actually paid on the bond; and it was said, by Mr. Justice Holroyd, "In order to support this action, (assumpsit for money paid,) the debt must have been extinguished either by an actual or virtual payment of money by the plaintiff to the defendant's use. There has clearly been no actual payment, and in order to have made the giving of the bond operate as a virtual payment, the defendant must be shown to have been a party to that transaction, which was not the case."

that the contract should clearly be considered by them as an extinguishment of the debt so far as the original parties were concerned;¹ or in other words, a strict novation of the debt is

¹ *Wilson v. Coupland*, 5 Barn. & Ald. 228. In *Wharton v. Walker*, 4 Barn. & Cres. 164, Mr. Justice Bayley, commenting on this case, says: "The case of *Wilson v. Coupland* is very distinguishable from the present. There the defendants were originally indebted to Taillasson & Co. for money had and received, and Taillasson & Co. were indebted to the plaintiffs, and with the consent of all parties, it was arranged that the plaintiffs should take the defendants as their debtors. By that arrangement the demand against Taillasson & Co. was extinguished, and the defendants having been indebted to them for money had and received, it was held that the plaintiffs might recover in that form of action. In the present case no money was ever had and received by the defendant to the use of any person, which objection existed in *Israel v. Douglas*, and has caused the propriety of that decision to be since doubted. But there is another objection to the present case. If, by an agreement between the three parties, the plaintiff had undertaken to look to the defendant and *not to his original debtor*, that would have been binding, and the plaintiff might have maintained an action on the agreement; but in order to give him that right of action there must have been an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant refusing to pay the plaintiff, the latter might still sue Lythgoe, and this brings the case within *Cuxon v. Chadley*." It is to be observed, however, that the ground upon which the judgment of the court, in *Wilson v. Coupland*, was founded, was not that the original debt was extinguished, but only that there was an "absolute promise" between the plaintiff and defendant, and it is nowhere admitted, in the case, that the original parties were unconditionally released. Mr. Justice Best says: "A chose in action is not assignable without the consent of all parties. But here all parties have assented, and from the moment of the assent of the defendants, it seems to me that the balance of £768 became money had and received to the plaintiff's use. It is said that the *promise* was conditional. That may, perhaps, be doubtful, but supposing it to be conditional, the event has happened upon which it became absolute." The case really decides nothing more than that where the drawee makes an absolute promise to pay, he renders himself liable to the holder of the order. See also *Ford v. Adams*, 2 Barb. Sup. Ct. R. 349, 350. In this case the declaration averred that J. S., being indebted to the plaintiff, made an order to the defendant to deliver the plaintiff a certain quantity of wood, and that the defendant accepted the order and promised J. S. to deliver the wood. But it was held on demurrer that the action was not maintainable, and the court said: "The defendant's acceptance of the

necessary to found a right, on the part of the third person, to recover against the drawee.

order, and his promise as stated in the declaration, were without any consideration, and therefore void. This case cannot be likened to one where a debt due upon a bond, or any other contract not negotiable, has been assigned, and the debtor makes an express promise to pay. In such a case the assignee can, in his own name, in a court of equity, compel the payment of the debt. The debtor, in such a case, is under a moral and equitable obligation to pay the debt of the assignee; and that obligation is a sufficient consideration for his promise to pay the debt. (*Compton v. James*, 4 Cowen, 13.) But in this case the plaintiff is not the assignee of the debt due from the defendant to Jacob Schyer. The order which he held gave him no equitable right to compel the defendant to deliver to him any wood, nor was the defendant, by reason of the order, under any moral or equitable obligation to deliver any wood to Jacob Schyer, or to the plaintiff. He received nothing for his acceptance of the order and his promise to deliver the sixty cords of wood. The debt due from him to Jacob Schyer was not thereby satisfied in whole or in part; and had the defendant delivered the sixty cords of wood to the plaintiff, he could not have discharged the defendant from the whole or any part of the debt due to Jacob Schyer. The plaintiff gave no consideration to Jacob Schyer for the order, nor to the defendant for his acceptance of the order, and his promise to deliver the wood. If the defendant had, in consideration of his owing \$200 to Jacob Schyer, promised to deliver to him sixty cords of wood, the promise would have been without consideration, without a promise on the part of Jacob Schyer that he would accept the wood in satisfaction of part or the whole of the debt due to him." In this case it will be observed that there was no privity of contract between the plaintiff and the drawee, and no reciprocal promise and acceptance between them, which, of itself, would bring the case within the decisions requiring assent of all parties, without going so far as to require an utter extinguishment of the debt. See also *Thomas v. Shillibeer*, 1 Mees. & Welsb. 124; *French v. French*, 3 Scott, N. R. 125; s. c. 2 Man. & Grang. 644; *Short v. City of New Orleans*, 4 Louisiana Annual R. 281; *McKinney v. Alvis*, 14 Ill. R. 34. In *Butterfield v. Hartshorn*, 7 N. Hamp. R. 345, an action of assumpsit was brought by the plaintiff to recover an amount claimed against the estate of a person deceased. The executor sold a farm belonging to the estate to the defendant, and left in the defendant's hands a portion of the purchase-money to pay the plaintiff, and other creditors, their demands against the estate, which the defendant promised the executor to pay; but it was held that the plaintiff could not recover. Upham, J., said, in delivering the judgment, "The principal question in this case is, whether the plaintiff can avail himself of the promise made by the defendant

§ 376 *w.* The true result of the English cases would seem to be, that the assent of the three parties is necessary to create a reciprocal right and obligation between the drawer and the person in whose favor the order is drawn, but that the absolute extinguishment of the original debt would not be required. The taking of a draft or order, would seem to operate as a

to the executor, he never having agreed to accept the defendant as his debtor nor having made any demand on him for the money prior to the commencement of the suit." "In cases of this kind a contract, in order to be binding, must be mutual to all concerned, and until it is completed by the assent of all interested, it is liable to be defeated, and the money deposited countermanded." Thus far this case proceeds exactly upon the grounds of the decisions cited in the previous note, and the doctrine laid down is amply sufficient to support the judgment. But the learned judge continues, "It seems, also, to be clear, that no contract of the kind here attempted to be entered into can be made, without an entire change of the original rights and liabilities of the parties to it. There is to be a deposit of money for the payment of a prior debt, — an agreement to hold the money for this purpose, and an agreement on the part of a third person to accept it in compliance with this arrangement. It is made through the agency of three individuals, for the purpose of payment; and it can have no other effect than to extinguish the original debt, and create a new liability of debtor and creditor betwixt the person holding the money and the individual who is to receive it. On any other supposition there would be a duplicate liability for the same debt; and the deposit, instead of being a payment, would be a mere collateral security, — which is totally different from the avowed object of the parties.

"What proceeding will constitute an assent to this contract, and discharge the original debtor? Will a demand of the money have this effect? An individual who should receive advices from his debtor of a deposit of money for his benefit, would hardly deem a demand of the money, accompanied by a refusal of payment, a discharge of the prior debt. A suit to recover money is no more decisive evidence of an election to receive it, than a demand; and the bringing of a suit cannot be considered evidence of an assent to a contract, and thereby support the action which had no foundation until it was brought.

"To entitle the plaintiff to recover, there must be an extinguishment of the original debt; and it is questionable whether, in cases of this kind, any thing can operate as an extinguishment of the original debt but payment, or an express agreement of the creditor to take another person as his debtor in discharge of the original claim." See also *Scott v. Porcher*, 3 Meriv. R. 652; and *Baron v. Husband*, 4 Barn. & Adolph. 614.

conditional payment of the debt, and when accepted by the drawee, it would be binding as between him and the holder, so as provisionally to exclude the original drawer; but on non-payment by the drawee, the condition failing, the holder of the draft would have a right to recur to the original creditor.¹

¹ In *Bedford v. Deakin*, 2 Barn. & Ald. 210, one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of one partner for the amount, strictly reserving his right of action against all three, and retained possession of the original bills; the separate notes having proved unproductive; it was held that the creditor might still resort to his remedy against the other partners, and that the taking the separate notes and receiving them several times, did not amount to a satisfaction of the joint debt. In delivering the judgment, Mr. Justice Bayley says: "In this case, all the three partners originally were jointly liable to this debt; and no arrangement between themselves can vary the right of the creditor. That right, however, may be destroyed by the creditor consenting to accept of the separate security of one partner in discharge of the joint debt, and that is the foundation of the decision in the two cases cited from *Espinasse's Reports*; but there is no such consent here. The three notes which the plaintiff took from *Bickley* (two of which have been successfully renewed, but one not) cannot amount to a satisfaction of the joint debt; unless, first, they were, when taken by the plaintiff, intended by him as a satisfaction for it; or unless, secondly, the conduct of the plaintiff has, without the fault of *Deakin*, produced mischief to him." See also *Wilson v. Coupland*, 5 Barn. & Ald. 231. The same rule, also, was laid down in *Robinson v. Read*, 9 Barn. & Cres. 449. In *Reed v. White*, 5 Esp. N. P. Cas. 122, where the separate bill of one owner of a vessel was taken for a claim against the vessel, Lord Ellenborough said: "If the plaintiff, dealing with *White* separately, has adopted him, he has discharged the others." "The question is, whether it was intended as a settlement with *him alone*, and adopting him as the *single debtor*." See post, § 979, § 979 a. See also *Cuxon v. Chadley*, 3 Barn. & Cres. 591. In this case *J. C.* being indebted to *S.*, and *R. C.* being indebted to *S.* and also to *J. C.*, it was verbally agreed between the three that *S.* should transfer the debt due to him from *J. C.* to the account of *R. C.*, and *S.*, in pursuance of such agreement, delivered to *R. C.* an account in which he (*R. C.*) was charged with the debt due from *J. C.* to *S.*, and it was held, that *J. C.* was not thereby discharged; and the ground of this judgment was, that there was no proof of any agreement as between *S.* and *J. C.* to extinguish the original obligation, the mere entry in the books not having that effect. *Abbott, C. J.*, said: "*S.* is not proved to have said 'I will take you

The mere conditional claim against the original creditor would not, on principle, seem to interfere with the holder's right against the drawee, and there seems to be no sufficient reason to require its absolute extinguishment. The holder would, of course, be bound primarily to look to the drawee, and to omit no proper steps to obtain payment, and, until the condition failed, would have no right as against the original drawer. There may, of course, be cases where an order is taken as absolute payment; and whether it be or not is a question of fact for a jury to determine.¹ But ordinarily, in the com-

Robert, as my debtor, and discharge James; he is not proved ever to have said or done that which would have the effect of discharging J." "I consider the entry ('to your brother's account £14 1s.') made by S. to mean no more than this: 'I will debit the account of R. for £14 1s., not, I will discharge J. at all events from this sum.' It amounts, at most, to an accord, but certainly not to a satisfaction." In *Tatlock v. Harris*, 3 T. R. 180, a bill of exchange was drawn by the defendant and others, on the defendant alone, in favor of a fictitious person (which was known to all parties concerned in drawing the bill) and the defendant received the value of it from the second indorser; and it was held that a *bonâ fide* holder, for a valuable consideration, might recover the amount of it in an action against the acceptor, for money paid or money had and received. Lord Kenyon, in delivering the judgment of the court, says: "In making this decision we do not mean to infringe a rule of law which is very properly settled, that a chose in action cannot be transferred; but we consider it as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill; and this will satisfy the justice of the case without infringing any rule of law." In *Drake v. Mitchell*, 3 East, R. 257, one of three joint covenantees gave a bill of exchange for a part of a debt secured by the covenant, on which bill judgment was recovered; and it was held that the judgment was no bar to an action of covenant against the three, though stated to have been given for the payment and in satisfaction of the debt, not being averred to *have been accepted as satisfaction*, nor to have produced it in fact. Lord Ellenborough says: "One may agree to accept of a different security as satisfaction of a debt, but it is not stated here that *they were accepted as satisfaction*." See also *Hennings v. Rothschild*, 4 Bing. R. 334; *Ward v. Evans*, 2 Lord Raym. R. 928; *Hawley v. Foote*, 19 Wend. R. 516.

¹ *Thompson v. Percival*, 5 Barn. & Adolph. 932, where a separate bill was given for a joint debt, Lord Denman said: "It appears to us that the facts proved raise a question for the jury, whether it was agreed between the plain-

mon transactions of business, the taking of an order is not understood to amount to a discharge of the principal. Of what value would the order be, if the holder could not compel payment by the drawee, and why to render it available, should he be obliged absolutely to abandon his original claim? There is no reason why he should not hold both. If collateral or secondary security may be held, why not primary security? It is clearly established that the taking of a bill of exchange drawn upon a third person, only operates as a conditional payment, and may be sued against the drawee if accepted — why the same rule should not apply to cases of mere orders, it is difficult to perceive. At all events, this doctrine would seem to be supported by the main body of authorities, and to be best supported on principle. The objection, that without an extinguishment of the original debt, there is no consideration to uphold the new promise of the drawee, seems scarcely tenable. The obvious consideration is, the right of the drawee to make the order, the existence of the debt, and the convenience resulting from the change of parties. The drawer has an undoubted right to give the order, and the liability of the drawee is sufficient consideration. The same consideration supports the original and the subsequent promise.¹

§ 376 *x*. In America, however, the rule is not so stringent as in England; and it seems to be well established, that wherever there is a special contract, by which a debtor agrees with his creditor to pay over to a third person the sum he owes, no new promise from the debtor to the third person is required to create a privity of contract between them, so as to

tiff and James that the former should accept the latter as their sole debtor and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both." The same point is ruled in *Reed v. White*, 5 Esp. N. P. C. 122. See previous note. But see *Evans v. Drummond*, 4 Esp. N. P. C. 89; and *Baillie v. Moore*, 8 Q. B. 497; *Gifford v. Whittaker*, 6 Q. B. 249.

¹ *Lilly v. Hays*, Adol. & Ell. 550. See post, § 451.

enable the third person to sue the debtor directly; and the ground of this rule is, that such a transaction creates an implied trust on the part of the debtor to hold the sum for the third person as his trustee; so that although in respect to the express promise he is a stranger, yet in respect to the implied promise, growing out of the express contract, he is a privy and party in interest.¹ An exception to this rule might

¹ *Hall v. Marston*, 17 Mass. R. 575; *Weston v. Barker*, 12 Johns. R. 281; *The Delaware & Hudson Canal Co. v. The Westchester Bank*, 4 Denio, R. 97; *Brewer v. Dyer*, 7 Cushing, R. 340. In this case Bigelow, J., said: "But there is a ground taken by the plaintiff, upon which the court are of opinion that he is entitled to recover in this form of action; and that is, upon the principle of law, long recognized and clearly established in this commonwealth, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. *Felton v. Dickinson*, 10 Mass. 287; *Hall v. Marston*, 17 Mass. 575; *Arnold v. Lyman*, 17 Mass. 400; *Carnegie v. Morrison*, 2 Met. 381. In the latter case, all the authorities are fully reviewed in the opinion of the court, and the rule of law clearly vindicated and established. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; *Dutton v. Pool*, 1 Vent. 318; 2 *Walford on Parties*, 1144; nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff; by *Coleridge, J.*, in *Lilly v. Hays*, 5 Ad. & El. 551; but upon the broader and more satisfactory basis, that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded. In the case at bar, the agreement, although made between *Parmelee* and *Dyer*, is in express terms to pay the rent to *Brewer*, the plaintiff, and he is the party to be benefited thereby. It is made upon a valid consideration, as between *Parmelee* and the defendant; being the surrender of the shop by the former, and its occupation by the latter. To make the defendant liable, no consideration need move as between him and the present plaintiff. Nor is it any objection to the plaintiff's right to recover, that *Parmelee* might also have a remedy on the contract, in case the plaintiff should not elect to adopt it. It does not operate to extinguish *Parmelee's* liability. The plaintiff, if he so elects, can seek his remedy on the agreement, or may rely on the original undertaking of his lessee; in which latter case, *Parmelee* could enforce the contract against the defendant. These principles are all well settled in the adjudged cases, and it is unnecessary to en-

be admitted in cases of pure agency, where the agent is di-

large upon them. It seems to us that the case at bar falls clearly within them, and that the agreement in question, having been made for the benefit of Brewer on a sufficient consideration, and having been accepted and adopted by him, he can well maintain his action of assumpsit against the defendant." So, also, in *Mellen v. Whipple*, 1 Gray, R. 320, a similar ground was taken by Mr. Bishop of counsel for the defendants, and supported by the court. Metcalf, J., says: "The counsel for the plaintiff, in his brief, puts the case upon this ground: 'On a promise not under seal, made by A. to B., for a good consideration, to pay B.'s debt to C., C. may sue A.'" Lord Holt, in *Yard v. Eland*, 1 Ld. Raym. 368, and Buller, J., in *Marchington v. Vernon*, 1 Bos. & Pul. 101, note, used nearly the same language; and it has been transferred into various text-books, as if it were a general rule of law. But it is no more true, as a general rule, than another maxim, often found in the books, namely, that a moral obligation is a sufficient consideration to support an express promise. Both maxims require great modification; because each expresses rather an exception to a general rule, than the rule itself. And the needed modification of the latter maxim has been authoritatively made, and is now well understood. 3 Bos. & Pul. 249, note; *Mills v. Wyman*, 3 Pick. 207; *Smith v. Ware*, 13 Johns. 259; 2 Greenl. Ev. § 107. But the limitations of the maxim on which the plaintiff relies are not so clearly established. By the recent decisions of the English courts its operation is restricted within narrower limits than formerly; and the general rule, to which it is an exception, is now more strictly enforced. That general rule is, and always has been, that a plaintiff, in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is sometimes thus expressed: There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action, by the plaintiff, on the contract. *Crow v. Rogers*, 1 Stra. 592; *Ross v. Milne*, 12 Leigh, 204; *Morrison v. Beckey*, 6 Watts, 349; 1 Selw. N. P. (11th ed.) 49. The cases which form exceptions to this rule are included in the maxim on which the plaintiff attempts to support this action. We shall not undertake to classify all these exceptions which are found in the English and American decisions. It will be sufficient for the determination of this case, to mention three distinct classes, which comprise all the cases on this point, that have been decided in this commonwealth, and relied on by the plaintiff's counsel, in argument.

1. *Indebitatus assumpsit* for money had and received, can be maintained, in various instances, where there is no actual privity of contract between the plaintiff and defendant, and where the consideration does not move from the plaintiff. In some actions of this kind a recovery has been had, where the

rected to pay over to a third person a sum of money, since

promise was to a third person for the benefit of the plaintiff; such action being an equitable one, that can be supported by showing that the defendant has in his hands money which in equity and good conscience, belongs to the plaintiff, without showing a direct consideration moving from him, or a privity of contract between him and the defendant.

"Most of the cases in this first class, are those in which A. has put money or property into B.'s hands as a fund from which A.'s creditors are to be paid, and B. has promised, either expressly, or by implication from his acceptance of the money or property without objection to the terms on which it was delivered to him, and pay such creditors. In such cases, the creditors have maintained actions against the holder of the fund. *Disborn v. Denaby*, 1 D'Anv. Ab. 64; *Starkey v. Mill*, Style, 296; *Ellwood v. Monk*, 5 Wend. 235; *Delaware & Hudson Canal Co. v. Westchester County Bank*, 4 Denio, 97; *Fleming v. Alter*, 7 S. & R. 295; *Beers v. Robinson*, 9 Barr, 229. The cases in Massachusetts, which clearly fall into this class, are *Arnold v. Lyman*, 17 Mass. 400, recognized in *Fitch v. Chandler*, 4 Cushing, 255; *Hall v. Marston*, 17 Mass. 575; and *Felch v. Taylor*, 13 Pick. 133. On close examination, the case of *Carnegie & Another v. Morrison & Another*, 2 Met. 381, will be found to belong to the same class. The chief justice there said: 'Bradford was indebted to the plaintiffs, and was desirous of paying them. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking he forbore to adopt other measures to pay the plaintiff's debt.'

"By the recent English decisions, however, one to whom money is transmitted, to be paid to a third person, is not liable to an action by that person, unless he had agreed to hold it for him. And such was the opinion of Spencer, J., in *Weston v. Barker*, 12 Johns. 282. See the English cases collected 1 Archb. N. P. (Amer. ed. 1848,) 121-125.

"2. Cases where promises have been made to a father or uncle, for the benefit of a child or a nephew, form a second class, in which the person for whose benefit the promise was made has maintained an action for the breach of it. The nearness of the relation between the promisee and him for whose benefit the promise was made, has been sometimes assigned as a reason for these decisions. And though different opinions, both as to the correctness of the decisions, and as to this reason for them, have often been expressed by English judges, yet the decisions themselves have never been overruled, but are still regarded as settled law. *Dutton v. Pool*, 1 Vent. 318, is a familiarly known case of this kind, in which the defendant promised a father, who was about to fell timber for the purpose of raising a portion for his daughter, that

without an express promise from the agent, he would not, on general principles, be liable personally.¹

§ 376 *y*. Again, in England as well as in America, there is a somewhat different class of cases, wherein a special trust is created by the agreement, from which a privity of the third person arises by implication;—as where the agreement relates to some property or thing belonging to the third person, or in respect to which he has a special interest, and the consideration grows out of the use of such property.² Thus, where

if he would forbear to fell it, the defendant would pay the daughter £1,000. The daughter maintained an action on this promise. Several like decisions had been previously made. *Rookwood's Case*, Cro. Eliz. 164; *Oldham v. Bateman*, 1 Rol. Ab. 31; *Provender v. Wood*, Hetl. 30; *Thomas's Case*, Style, 461; *Bell v. Chaplain*, Hardr. 321. These cases support the decision of this court in *Felton v. Dickinson*, 10 Mass. 287.

“3. The last case in this commonwealth, which was cited in support of the present action, is *Brewer v. Dyer*, 7 Cush. 337. In that case, the defendant gave to the lessee of a shop a written promise to take the lease and pay to the lessor the rent, with the taxes according to the terms of the lease. The defendant entered into possession of the shop, with the knowledge of the lessor, and paid the rent to him, for a year, and then left the shop. And it was decided that he was liable to the lessor for the subsequently accruing rent, and for the taxes, on his promise to the lessee.”

See also *Neilson v. Bright*, 1 Johns. Cas. R. 205; *Hawley v. Foote*, 19 Wend. R. 516. But in *Bigelow v. Davis*, 16 Barb. S. C. R. 561, it is held, that in cases of mere agency for the transmission of money, the party for whom the money was designed cannot bring an action against the agent without his express promise; but it is admitted that where the relation of principal and agent does not exist, but there is a special contract, an express promise would not be required.

¹ *Bigelow v. Davis*, 16 Barb. S. C. R. 561; *Colvin v. Holbrook*, 2 Comst. R. 126; *Merritt v. Johnson*, 7 Johns. R. 472; *Cobb v. Becke*, 6 Q. B. R. 930.

² In *Pigott v. Thompson*, 3 Bos. & Pul. 149, Lord Alvanley said: “It is not necessary to discuss whether if A. let land to B., in consideration of which the latter promises to pay the rent to C., his executors and administrators, C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient; though my brothers seem to think differently upon this point. It appears to me that C. would be only a trustee for A., who might, for some reason, be desirous that the money should be paid into the hands of C. In case of marriage

premises belonging to the third person are sub-let, the under-tenant agreeing to pay over the rent to the landlord without privity of the latter, it has been held that the landlord may sue the sub-tenant for the rent.¹ So, where the defendant, being a remainder-man, promised a father who was about to fell timber for the purpose of raising a portion for his daughter, that if he would forbear to do so, the defendant would pay the daughter £1,000; it was held that the daughter could maintain the action.² In these cases where there is a special inter-

it is often necessary to make contracts in this manner, and the personal action is given to the trustee for the benefit of the *feme covert*." See also *Mellen v. Whipple*, 1 Gray, R. 323; *Brewer v. Dyer*, 7 Cush. R. 337. See also *Jones v. Robinson*, 1 Exchequer, 454. In this case the declaration stated that the plaintiff and A. B. carried on business in copartnership, and in consideration that the plaintiff and A. B. would sell defendant the business, and would become trustees for him in respect to all debts, &c. due to the plaintiff and A. B. in respect thereof, the defendant promised the plaintiff to pay him all the money he had advanced in respect to the copartnership, and for which it was accountable to the plaintiff. The averment was, that the plaintiff and A. B. did sell the business to the defendant, and that, at the time of the promise, the plaintiff had advanced a certain sum. The breach alleged was non-payment; and it was held, on motion of arrest of judgment, that it was not necessary to join A. B. as co-plaintiff, and that the declaration was good. Parke, J., said: "It is true that no stranger to the consideration can sue; but in the present case the separate interest of the plaintiff in the partnership fund is the consideration on which the promise is founded; and this case does not fall within the rule for which the defendant contends." In *Marchington v. Vernon*, 1 Bos. & Pul. 101, note, which was an action by the holder of a bill of exchange against the assignees of the drawee, on a promise made by the bankrupt to the drawee that he would honor the bill, Mr. Justice Buller said, that "independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action on it." In this case the third person had a special interest in the subject-matter of the contract. See also *Carnegie v. Morrison*, 2 Metcalf, R. 381; *Bell v. Chaplain*, Hardr. R. 321; *Bigelow v. Davis*, 16 Barb. S. C. R. 564; *Arnold v. Lyman*, 17 Mass. R. 400; *Schermerhorn v. Vandereheyden*, 1 Johns. R. 140; *Gold v. Phillips*, 10 Johns. R. 412; *Farley v. Cleveland*, 4 Cowen, R. 432; *Barker v. Backlin*, 2 Denio, R. 55.

¹ *Brewer v. Dyer*, 7 Cushing, R. 337; *Mellen v. Whipple*, 1 Gray, R. 323.

² *Dutton v. Poole*, 1 Vent. R. 318; s. c. 2 Lev. R. 210. Of this case Lord

est of the third person in the subject-matter of the contract, the English rule creates a privity by implication, and in this respect would seem to differ from that, which, as we have seen, is held to be applicable to mere orders on a debtor to pay over money to a third person, a new promise being necessary, in the latter case, to enable the third person to sue the debtor.¹ Under this class seem to come all cases where orders are given upon depositaries, such as wharfingers and warehousemen, to deliver specific goods sold to the purchaser. It is the ordinary custom for the vendor to give these orders in writing to the vendee, who sends them to the depositary for acceptance; and when accepted by him, he becomes the bailee for the purchaser.² But it would seem, in these cases, to make no difference, as to the legal result, whether the order be sent by the purchaser, or by the seller. In either case, the acceptance of the order, and the transference on the books of the depositary, would vest the title to the goods in the purchaser.³ A distinc-

Mansfield said, in *Martyn v. Hind*, Cowp. R. 413; s. c. 1 Doug. R. 146, "It is difficult to conceive how a doubt could be entertained in the case of *Dutton v. Poole*." See also *Rookwood's case*, 1 Cro. Eliz. R. 164, which was similar in its circumstances. Sometimes these cases are put upon the ground of nearness of relationship, as by Scroggs, C. J., in 2 Levinz, R. 211, in which he says: "There is such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, and such a nearness of relationship between them that the consideration and promise to the father may well extend to the children." But it is rather the special interest that children have in the property, than the affection, which creates the true privity of consideration in these cases. See also *Levit v. Hawes*, Cro. Eliz. 619, 652.

¹ See ante, § 376 *v.* 376 *w.*

² *Gillett v. Hill*, 2 Cr. & Mees. 536; *Harman v. Anderson*, 2 Camp. R. 242; *Holl v. Griffin*, 3 Moore & Scott, 732; s. c. 10 Bing. R. 246; *Whitehouse v. Frost*, 12 East, R. 621; *Lickbarrow v. Mason*, 6 East, R. 19. See post, § 810; *Hammond v. Anderson*, 4 Bos. & Pul. 69.

³ In *Bryans v. Nix*, 4 Mees. & Welsb. 791, Parke, B., says: "If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master employed by the consignor, or a third person, and the chattels are so

tion is, therefore, to be observed between these cases in which the order relates to specific goods, which must be distinguished from all other similar goods, and cases where the order relates to a sum of money, which may be paid in any coins of the country. In the former case the order gives a special interest in certain definitely ascertained articles, and in the latter it could only occasion a general responsibility for the sum stated; and this distinction may be the reason for the different rule which obtains in England in the two classes of cases.

§ 376 *z*. In all cases of novation where, by assent of all parties, there is a new promise between the substituted parties, and an extinguishment of the old debt, the contract is not an undertaking to pay the debt of a third person, within the meaning of the statute of frauds.¹

placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected; nor is it material whether the person who is to have the property be a factor or not; for such an agreement may be made with a factor, as well as any other individual." *Salter v. Woollams*, 3 Scott, N. R. 65.

¹ *Bird v. Gammon*, 3 Bing. N. C. R. 883. Read *Executors of Tuack v. Nash*, 1 Wils. R. 305.

CHAPTER XVI.

MUTUAL ASSENT OF THE PARTIES.

§ 377. THE next subject which we propose to consider is the assent of the parties to a contract. There are three requisites to legal assent, namely,—It should be mutual; it should be without restraint; it should be understandingly made, and without error or mistake. We shall consider, therefore, the qualities which characterize consent, under three heads, namely,—1st. Mutuality of Assent; 2d. Duress; 3d. Mistake.

§ 378. In order to create a contract, it is essential that there should be a reciprocal assent to a certain and definite proposition. A mere offer not assented to, constitutes no contract, for there must be not only a proposal, but an acceptance thereof.¹ So long as a proposal is not acceded to, it is binding upon neither party, and may be retracted. Thus, where A. applied to an insurance company for insurance, and agreed upon the rates to be paid, and the policies were made out, but not delivered, because A. refused to accept them or sign the notes, it was held that he might retract, and that the bargain was not completed.² Nor does it matter by what mode assent is ex-

¹ *Tucker v. Woods*, 12 Johns. 190; *Jackson v. Galloway*, 5 Bing. N. C. 75, 76; *Rowell v. Montville*, 4 Greenl. R. 270; *Johnson v. King*, 2 Bing. R. 270; *Cope v. Albinson*, 16 Eng. Law & Eq. R. 470, and Bennett's note; *Gaunt v. Hill*, 1 Starkie, R. 10; *Eskridge v. Glover*, 5 Stewart & Porter, 264; *Governor, &c. v. Petch*, 28 Eng. Law & Eq. R. 470.

² *Real Estate Ins. Co. v. Roessle*, 1 Gray, 336.

pressed, provided it be intelligible. Thus, it may be given by a nod, by shaking hands, taking off a shoe, or drawing a shilling across the hand, all of which are signs of ratification among different nations.¹ Again, a blow of the hammer at an auction sale is sufficient to complete the contract, unless the offer be retracted before the hammer is down.² So, also, a contract may be created between deaf and dumb persons, so as to be completely obligatory, by any signs, which are reciprocally intelligible; for assent may be as perfectly given by means of pantomime as by the more refined hieroglyph of words.

§ 379. So, also, the silence of either party will import assent to the terms of a contract, whenever it would have been incumbent on him to express his dissent, if he did not agree thereto; or where his silence is explicable only by the presumption of his assent.³ But whether the facts of the case indicate a mutual agreement, is for a jury to determine.⁴

~ § 380. Where a verbal proposal is made, without any stipulation as to the time within which it shall be accepted, it should be accepted on the spot, or the proposer will not ordinarily be bound.⁵ For, however willing and desirous he may be to have his offer accepted at the time and place when and where he makes it, it does not follow that he will be willing to abide by that offer at a different time and under other circumstances. Yet, if the custom of the trade, or the previous usage between the parties, or any peculiar circumstances of

¹ 2 Black. Comm. 448; Toullier des Contracts, § 33; 2 Heinnecc. de Jure. Ant. Germ. § 335; Ruth. ch. 4, p. 8, 9; Bracton, L. 2, c. 27; Inst. L. 3, art. 24.

² *Payne v. Cave*, 3 T. R. 148.

³ *Hubbard v. Coolidge*, 1 Metcalf, R. 93; *Train v. Gold*, 5 Pick. R. 380; Toullier des Contracts, § 32.

⁴ *Thruston v. Thornton*, 1 Cushing, R. 89.

⁵ *Johnston v. Feesler*, 7 Watts, R. 48.

the case indicate an intention on the part of the offerer to allow reasonable time, his offer will be accepted within reasonable time.¹ What would constitute reasonable time must, of course, depend upon the peculiar circumstances of the case.²

§ 380 *a*. The offer of a reward or compensation for the performance of any service — as, for instance, for the finding and returning of money or any lost article, — is a case of a conditional promise; and if any one coming within the terms of the offer, shall, before its revocation, perform the service, a legal and binding contract arises to pay the reward.³ Such an offer of reward is not, however, to be considered as unlimited in time, and continuing until a formal withdrawal is made, but to be restricted to what, under the circumstances, is a reasonable time.⁴ But an offer of reward to a public officer to do what it is incumbent on him to do by law, is not binding, because it is contrary to public policy.⁵

§ 381. If, by the terms of an offer, a certain time be prescribed, within which it may be accepted by the other party, it must be accepted within that time. The rule of law is, that the party making such an offer may retract it at any time previous to its acceptance by the other party, and an acceptance subsequent to such retraction, would create no contract, although it should be within the time originally prescribed; and the ground upon which this rule is said to be founded, is that the offer being merely gratuitous, there is no sufficient consid-

¹ See *Peru v. Turner*, 1 Fairf. R. 185, where six years afterwards was held an unreasonable time.

² *Mactier v. Frith*, 6 Wend. R. 103; *Beckwith v. Cheever*, 1 Foster, R. 41; *Peru v. Turner*, 1 Fairf. R. 185.

³ *Freeman v. Boston*, 5 Metcalf, R. 56; *Lancaster v. Walsh*, 4 Mees. & Welsb. 16; *Thatcher v. England*, 3 Com. B. R. 254; *Gerhard v. Bates*, 20 Eng. Law & Eq. R. 133; *Williams v. Carwardine*, 4 Barn. & Adolph. 621.

⁴ *Loring v. City of Boston*, 7 Metcalf, R. 409.

⁵ *Smith v. Whildin*, 10 Barr, R. 39. See also post.

eration to support it, until it is accepted.¹ Thus, where A. proposed to exchange horses with B., and to give B. a specific sum as difference, upon which proposition B. had the privilege of reserving his determination until a certain day, and before that day A. retracted his proposal, it was held, that B. could not enforce against him his proposal, it not having been accepted before it was withdrawn.² So, also, where X. offered to purchase a house of Z., and gave him six weeks to consider whether he would accept it or not, it was held, that X. could retract his proposal at any time within the six weeks, before it was accepted.³ The assent of the party, having the option of accepting or rejecting such an offer, must be either express or necessarily implied from his acts or words, in order to bind the party making the proposal. And if he be silent, or do no act manifestly expressive of assent, no contract arises.⁴

§ 382. It would, however, seem to be more consonant with justice, and with the agreement of the parties, to enforce a different rule, and to hold, that whenever an offer is made, granting to a party a certain time, within which he is to be entitled to decide as to whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time, unless by agreement with the other. The reason, which is given, that the offer is without consideration and gratuitous, until accepted, does not seem to be well founded. The consideration is the expectation or hope, that the offer will be accepted, and this is sufficient legally to support the promise. The agreement is, therefore,

¹ *Eskridge v. Glover*, 5 Stew. & Port. 264; 20 Am. Jur. No. 39, p. 15, 16-32; *Cooke v. Oxley*, 3 T. R. 653; *Routledge v. Grant*, 4 Bing. R. 661; *Paine v. Cave*, 3 T. R. 148; *Boston and Maine Railroad v. Bartlett*, 3 Cush. 225; *Wright v. Bigg*, 21 Eng. Law & Eq. R. 591; *Jordan v. Norton*, 4 Mees. & Welsb. 155.

² *Eskridge v. Glover*, 5 Stew. & Port. 264.

³ *Routledge v. Grant*, 4 Bing. R. 661.

⁴ *Corning v. Colt*, 5 Wend. 253.

to be looked upon as an engagement by the one party, that he will not sell within a certain time, in consideration, that the other party will consider the matter, and not give a refusal at once. Again, the making of such an offer might betray the other party into a loss of time and of money, by inducing him to make examination, and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer.¹ Suppose, that, on faith of the offer, he proceed to make arrangements to enable him to purchase, or to make calculations to determine, whether he is in a condition to buy, or, whether the offer is worth accepting, and is fairly exerting his best judgment on the matter, is there any justice in allowing the other party to interfere and break his promise, after inducing a loss of time, or money, or

¹ Com. Dig. Action on the Case, Assumpsit, B.; *Violett v. Patton*, 5 Cranch, R. 142, 152; *Knight v. Rushworth*, Cro. Eliz. 469; *Brooks v. Ball*, 18 Johns. R. 337; *Perkins v. Binke*, 2 Sid. R. 123; *Travers v. —*, 1 Sid. R. 57; *Brett v. Pretymen*, 1 Sid. R. 283; *Loo v. Burdeux*, 1 Sid. R. 369; *Train v. Gold*, 5 Pick. R. 384. See also *White v. Demilt*, 2 Hall, R. 405; *Babcock v. Wilson*, 17 Maine R. 372; *Appleton v. Chase*, 19 Maine R. 74. In *Violett v. Patton*, 5 Cranch, R. 142, it is said by Mr. Chief Justice Marshall: "To constitute a consideration, it is not necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction." So, in *Train v. Gold*, it is said, "Any gain to the promisor, or loss to the promisee, *however trifling*, is a sufficient consideration to support an express promise:" and this is affirmed in all the cases above cited. The mere fact, that the consideration is trifling, is not sufficient to render the promise gratuitous. In the case in question, if there were no consideration for the promise, what inducement could there be for the offerer to make his offer? It must be evident, that he expected an advantage, or hoped it at least. See post, Ch. VI. § 430, *et seq.* for the doctrine as to what constitutes a sufficient consideration, and the cases there cited. Again, it is not true that all gratuitous promises are void. Exceptions are allowed in cases of salvage, and of a mandate, and of the contracts by infants, and of work and labor done, with the acquiescence of the party, in whose favor it is done, though without his order, and in some cases of subscriptions. See post, § 453, *et seq.*; *Limerick Acad. v. Davis*, 11 Mass. R. 113; *Story on Bailments*, § 137, 164; *Abbott on Shipp.* pt. 4, ch. 10.

convenience? Nor does this view of the matter want authority. The doctrine contended for has been asserted by Toullier in France, and obtains in Scotland and Holland.¹ "In France," says Toullier, "when he who makes an offer has fixed a determinate time for acceptance, or has expressly or tacitly engaged not to revoke before the answer of the other party, the promise is not revocable during the terms; so, if I offer to you 100 pipes of wine at a certain price, and add, that I wait your answer before selling them to another, I cannot revoke my offer before the time necessary for having your answer. But if that answer is unduly delayed, I regain my freedom, which I had suspended only for a limited time."² Professor Bell, also, in his late work on Sales, reprobates the English rule. "It seems inconsistent," he says, "with the plain principles of equity, that a person who has been induced to rely on such an engagement, should have no remedy in case of disappointment. If, for example, a merchant propose to sell to another a cargo of sugar or of tobacco, and agree to give him a certain time to determine whether he will buy the goods or not, engaging not to dispose of them till the time has elapsed, and in the mean while he dispose of them, and disappoint the person to whom the promise has been made, who may have rejected an advantageous offer from another dealer, it seems unjust that, for the disappointment thus occasioned, there should be no remedy. The only answer to this in the English law, appears to be, that no one is entitled to rely on a unilateral engagement gratuitously made and without consideration. But one cannot help feeling, that a rule so different from what commonly happens in the intercourse of life, raises that inconsistency between law and justice, which is sometimes complained of. The subtleties of lawyers never ought to interfere with the common sense and understanding of mankind; and the law is on a better footing where an en-

¹ Code de Commerce de Hollande. Dispositions Générales, Art. 1, p. 65;
¹ Stair, 3, 9.

² 6 Toullier, Droit Civ. Français, p. 33, no. 30.

gagement, seriously made, is enforced by the law without regard to the motive from which it proceeds."

§ 383. Again, it is difficult to see why the same rule should not apply to cases where a proposal is made with a privilege to the other party to accept within a given time, that applies to sales "on trial." Sales "on trial" are executory contracts of sale, in which it is agreed that the proposed purchaser shall take the article of sale for a certain space, "on trial," with the privilege of returning it, in case it do not suit him. And, in these cases, if the seller allow to the purchaser a definite time for trial, the rule is, that he cannot, by any retraction of his offer, deprive the other of the right of trial during the whole term; or of the privilege of accepting the article at any time before the time has elapsed.¹ Nay, the rule goes even further than this, and allows the proposed purchaser to change his mind any number of times, and state different decisions to the other during the term, unless he return the article, or clearly break off the negotiation by a final refusal.

§ 384. In the next place, a proposal may not only be made personally, but by means of agents or letters, in case the parties are at a distance from each other. And in such cases, the rule is, that if the proposition be made in writing, and sent by the post, the person making the offer can retract by a subsequent letter reaching the other party at any time before an answer of acceptance is written and put in the mail. But as soon as such answer is placed in the mail, the contract is completely closed, as to both parties. Although, therefore, a letter, containing a retraction of the offer, be actually on the way at the time when the letter of assent is mailed, yet the contract is closed, unless such letter of retraction be received prior to the mailing of the letter of assent. An acceptance by writ-

¹ *Ellis v. Mortimer*, 4 Bos. & Pul. N. R. 257; *Humphries v. Carvalho*, 16 East, R. 45; *Reed v. Upton*, 10 Pick. R. 522.

ten communication takes effect from the time when the letter containing the acceptance is sent, and not from the time when it is received by the other party.¹ And the person assenting

¹ The Court of King's Bench, in the case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, conclusively settled this to be the English doctrine. The case was this:—The defendants, by letter, offered to sell to the plaintiffs certain specified goods, "receiving an answer in course of post." The letter being misdirected, arrived two days later than it ought, and was immediately answered by the plaintiff accepting the offer; but in the mean time, the goods had been sold to a third person; it was held, that as soon as the letter of acceptance was written and put in the mail, the bargain was perfected, and nothing remained to be done, but to deliver the goods, which was not essential to complete the sale. The court disregarded the case of *Cooke v. Oxley*, 3 T. R. 654, which decides the contrary doctrine, and which is so inaccurately and deficiently reported, that it is of little weight as an authority. Indeed, from the remarks of Bayley, J. in *Humphries v. Carvalho*, 16 East, 48, it would seem that the ground of the decision in *Cooke v. Oxley*, was "that there was only a proposal of sale by one party, and no allegation that the other party had acceded to the contract of sale," which harmonizes the case with the other authorities. The rule enunciated in the text has, since the last edition, been held in *Hamilton v. Lycoming Ins. Co.* 5 Barr (Pennsylvania), R. 339; *Levy v. Cohen*, 4 Georgia R. 1. See also *Potter v. Sanders*, 6 Hare, R. 1; *Dunlop v. Higgins*, 1 Clark & Finelly, (House of Lords cases,) 381; 12 Jur. 805; *Tayloe v. Merchants Fire Ins. Co.* 9 Howard, R. 390; *Duncan v. Topham*, 8 Com. B. Rep. 225; *The Palo Alto, Daveis*, R. 344; *Vassar v. Camp*, 14 Barbour, R. 341, and 1 Kernan, R. 441; *Beckwith v. Cheever*, 1 Foster, R. 41; *Averill v. Hedge*, 12 Conn. R. 436. But see *Gillespie v. Edmondston*, 11 Humphries, R. 553.

The Supreme Court of Massachusetts has, however, maintained the doctrine, that no acceptance is binding until knowledge of it has reached the other party. The case, in which this point was decided, is *McCulloch v. The Eagle Insurance Company*, 1 Pick. 278, and is as follows:—The Insurance Company, on the first day of January, offered by letter to insure the brig of the plaintiff on certain terms. On the next day the offer was retracted by another letter. On the third day, the first letter containing the proposal was received by the plaintiff, and an answer accepting it was immediately put in the mail, before the letter revoking the offer was received. The letter containing the retraction, and that containing the acceptance, crossed each other on the road; and it was held that there was no contract. The reasoning of the court is as follows: "The offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendants

cannot, therefore, even stop his letter on the road after it is once mailed. But a retraction takes effect when the letter of

until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed. Had the vessel arrived in safety on the 2d, or on the morning of the 3d, the plaintiff would not have accepted the offer, and was not bound to accept, so that the defendants would not have been entitled to any premium, and both must be bound in order to make the contract binding upon either, unless time is given by one to the other," &c.

The first proposition in this reasoning is only a new definition of the term "acceptance," which the law has already defined differently; and if it be correct, it seems impossible that a contract by letter should ever be completed; since, if the defendants were not bound until they had received notice of the acceptance, by a parity of reasoning, the plaintiffs were not bound until they had received information, that their acceptance was acceded to; and inasmuch as neither party could ever be sure that the other party had not retracted, by a letter then upon the way, no contract would ever arise. This is the reasoning of the court in *Adams v. Lindsell*, and seems satisfactory. The true reason why, if the vessel had arrived in safety, before the letter containing the acceptance was mailed, there would have been no contract, seems to be, that the subject of the contract (namely, a voyage from Martinico to the United States) having failed, the contract also fails; because if a contract be founded upon the existence of something, which does not in fact exist, although both parties supposed that it did when the contract was made, the agreement would, of course, be null from error or mistake. But we suppose that if the vessel had arrived at any time subsequent to the mailing of the answer of acceptance, the insurance would have been effected, and the plaintiff would have been rendered liable for the premium. See the subsequent case of *M'Intyre v. Parks*, 3 Metcalf, R. 207.

The rule, therefore, as stated in *Adams v. Lindsell*, seems the most correct, namely, "The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." This rule has been also sustained by the Court of Errors in New York, in the case of *Mactier v. Frith*, 6 Wend. R. 103, and in Connecticut, in *Averill v. Hedge*, 12 Conn. 436. See also an able criticism on the case of *Cooke v. Oxley*, in 20 Am. Jur. No. 39, p. 20, sustaining the doctrine as stated in the text. This doctrine of the common law, as stated in Bracton, 1, 2, c. 5, is supported by the Roman and Scottish law. See 1 Story, Eq. § 239, note, and cases cited.

Barbeyrac, in his notes on Grotius, says: "If one mentally accedes to an offer, there is, in fact, an union of minds, but assent must be proved; there-

retraction is received, and not when it is sent. But where an acceptance is conveyed by verbal message, it would not seem

fore a manifestation of assent is necessary as matter of evidence. It follows that assent to a proposal operates from the time that it is conveyed to the proposer. When they are apart, and communicate by letter or message, the assent operates from the time when the party expresses his assent to the messenger, or puts it on paper in the form of an acceding to the offer made to him." See Pothier on Sales, No. 32, (Cushing's Translation); Chitty on Cont. 14; Story on Agency, § 493, p. 630, note (2); Long on Sales, (Rand's ed.) 6, 183, 199; 2 Kent's Comm. 477, note (2); *Mactier v. Frith*, 6 Wend. 103; *Brisban v. Boyd*, 4 Paige, 17, 20. A different rule from this would evidently be productive of great mischief, and clog the facilities of commercial intercourse. Thus, suppose an offer be made to a foreign correspondent to purchase a certain quantity of cotton, at a certain price, during the necessary time which would elapse between the receipt of this letter, and the receipt of the letter assenting to his letter of acceptance, the market might, and in all probability would, so vary as to render either the purchase or the sale undesirable, according to the terms of the first proposition, and the bargain would never be concluded. The practical custom of merchants is founded upon the common sense rule, namely, to accept by letter and send the article immediately, without waiting for an assent to their acceptance.

Pothier, in his treatise on Sales, states an intermediate doctrine between the English and the Massachusetts rule, which seems to embrace the advantages of both, and to avoid the objections to both. He says, "In this contract, as in others, the consent of the parties may be manifested not only between those who are present together, but also between those who are at a distance from each other, by means of letters, or through the intervention of an agent, *per epistolam, aut per nuntium*. In order that the consent of the parties may take place, in the last-mentioned case, it is necessary that the will of the party who makes a proposition in writing, should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition. This will is presumed to continue, if nothing appears to the contrary; but, if I write a letter to a merchant living at a distance, and therein propose to him to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain; or if I die; or lose the use of my reason; although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills which is necessary to constitute the con-

to be binding, until the other party has received information of it.

§ 384 *a*. But where a proposal is made by letter, and the other party writes a letter accepting it, and places it in the hands of some person as his agent to forward the letter, the contract will not be concluded so long as the letter remains in the agent's hands. And although the agent so employed be postmaster, the contract is incomplete until the letter is actu-

tract of sale. This is the opinion of Bartholus and the other jurists cited by Bruneman, *ad* l. 1, § 2, *D. de contrah. empt.* (18, l. 1, § 2,) who very properly reject the contrary opinion of the Gloss, *ad dictam legem*. It must be observed, however, that if my letter causes the merchant to be at any expense, in proceeding to execute the contract proposed, or if it occasions him any loss, as, for example, if in the intermediate time between the receipt of my first and that of my second letter, the price of that particular kind of merchandise falls, and my first letter deprives him of an opportunity to sell it before the fall of the price; in all these cases I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity, that no person should suffer from the act of another; *Nemo ex alterius facto prægravari debet*. I ought therefore to indemnify him for the expense and loss which I occasion him by making a proposition which I afterwards refuse to execute. For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second which contains a revocation of it, or being in ignorance of my insanity or death, which prevents the conclusion of the bargain, charges to my account and forwards the merchandise; though, in that case, there cannot properly be a contract of sale between us, yet he will have a right to compel me or my heirs to execute the proposed contract, not in virtue of any contract of sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned." See, also, Toullier des Contrats, § 30; Duranton Contrat de Vente, Liv. 3, tit. 6, § 45; Story on Agency, § 493, n. (2); *Brisban v. Boyd*, 4 Paige, R. 17, 20; 2 Kent, Comm. Lect. 39, p. 477. See, also, *McIntyre v. Parks*, 3 Metcalf, R. 207, where A., being in a State where the sale of lottery tickets is unlawful, wrote to B., in a State where the sale is lawful, to purchase tickets; and it was held, that the sale was completed in the State where the assent was given, and not where it was received. See also *Head v. Deggon*, 3 Man. & Ryl. 97, and 1 Duer on Ins. 116 to 131, in note, where the subject is fully discussed.

ally mailed. Where, therefore, A., at Hopkinton, on the 15th of January, made an application to an insurance company at Concord for insurance on his house, and the insurance company stated by letter the terms on which they would insure, and prepared a written application and a premium note, both bearing date of the 16th, to be signed by A., and upon their being returned to the insurance company by mail, a policy bearing the same date was to be forwarded, and A.'s agent, who was the postmaster at Hopkinton, presented the written application and note on the 28th, and A. immediately signed them, and left them in the hands of the postmaster to be forwarded to the insurance company, and the papers were mailed and forwarded on the 3d of February, but the insurance company refused to give A. the policy — the buildings having been destroyed by fire on the 31st of January — it was held, in an action for the loss, that no contract of insurance had been completed, the papers signed by A. being in the hands of his agent, and therefore revocable, until after the buildings had been destroyed.¹

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§ 385. Similar is the case, where an order is sent by letter for merchandise. If the article be forwarded before the letter of retraction is received, the contract is completed, and the orderer is in the same predicament as if no retraction had been made. If, however, the order be received, and accepted either by letter, or by a procurement of the articles ordered, or by an action thereupon by the correspondent importing an acceptance, and before the articles were all procured, or were sent, the orderer should retract his order, he would be bound to take the goods already purchased, and to indemnify the other party for his expenses, trouble, and services. Again, if, in such a case, the person of whom they were ordered should order them of a third person, the first orderer would be bound

¹ Thayer v. Middlesex Mutual Fire Ins. Co. 10 Pick. R. 326.

to indemnify the second for all responsibilities incident to the compliance with the order.¹

§ 386. Where an offer is made and accepted by letters, they form a valid and binding contract, although they have reference to the future making of a formal agreement, and although the parties intend to have a written contract executed.² But if, after various letters have passed between the parties, and various propositions have been made, the parties finally reduce their agreement to writing, the written contract is to be taken as containing the joint terms of the bargain, and it is not to be varied by the letters or representations made previously; for the very object of a written agreement is to obviate all doubt in regard to the exact terms of the bargain, and to satisfy each party of the understanding of the other as to the stipulations of both.³ Yet, if one party be guilty of fraudulent representations to induce the bargain, the other may, upon proof thereof, recover against him.⁴

§ 387. But if a proposition be made with certain conditions or limitations, the acceptance must correspond to it in terms, or otherwise it will be considered as a new proposition, requiring the subsequent assent of the other party to render it binding.⁵ Thus, where B. was the lessee of a house belonging to C., and D. by letter proposed to B. to purchase the lease for a certain sum, to which proposal B. answered that he would

¹ Pothier *Contrat de Vente*, No. 32; Duranton *Cours de Droit Français*, Vol. 16; *Contrat de Vente*, Liv. 3, tit. 6, § 45; 2 Pardessus, No. 253; Bell on Sales, p. 38.

² *Thomas v. Dering*, 1 Keen, R. 729.

³ *Kain v. Old*, 2 Barn. & Cres. 634; *Vandervoort v. Col. Ins. Co.* 2 Caines, R. 161; *Mumford v. McPherson*, 1 Johns. R. 414; *Pickering v. Dowson*, 4 Taunt. R. 779; *Meyer v. Everth*, 4 Camp. R. 22.

⁴ *Daniel v. Mitchell*, 1 Story, R. 172; *Doggett v. Emerson*, 3 Story, R. 700; *Dobel v. Stevens*, 3 Barn. & Cres. 623; *Wright v. Crookes*, 1 Scott, N. R. 685; Post, *Illegal Contract*.

⁵ *Slaymaker v. Irwin*, 4 Whart. R. 369.

underlet the premises on the terms proposed, it was held that no contract arose, inasmuch as the proposal being for an assignment of the original lease, an agreement to underlet was not an acceptance of the exact terms offered.¹ So, where A. offered to purchase the lease of a house from B., if possession should be given on a particular day, and a definitive answer be made within six weeks, and B. accepted the proposal within the time, but offered possession upon a different day, and A. retracted his offer before the six weeks had elapsed; it was held, that inasmuch as neither party had ever agreed as to the terms proposed by the other, either of them might rescind it at any time.² So, if a trader order goods of a specified quantity or quality, or upon certain terms of credit, and the goods forwarded be neither of the same quality nor quantity, or if the credit be shorter, he is not bound to receive them.³ Yet if goods, different from those ordered, be accepted without objection, it will be regarded as an assent to the modification of the original proposal, and the contract will thus be rendered complete.⁴

§ 388. But where an offer is made in the disjunctive, an acceptance of either branch will be binding. Thus, if an offer be made to lease a house at \$600 per annum, or at \$800 with the furniture, either branch of the offer may be accepted. So, if an order be sent to a merchant, by letter, for four hundred or five hundred bales of cotton, he may send me either quantity.⁵

§ 388 *a*. It is not necessary, that the acceptance of a propo-

¹ *Holland v. Eyre*, 2 Sim. & Stu. 194.

² *Routledge v. Grant*, 4 Bing. 653; s. c. 3 Car. & Payne, 267; *Eliason v. Henshaw*, 4 Wheat. 225, S. P.; *Bell on Sales*, p. 37.

³ *Bruce v. Pearson*, 3 Johns. 534; *Tuttle v. Love*, 7 Johns. 470; *Champion v. Short*, 1 Camp. 53; *Putnam v. Tillotson*, 13 Metcalf, R. 517.

⁴ *Routledge v. Grant*, 3 Car. & Payne, 267; s. c. 4 Bing. 653; *Champion v. Short*, 1 Camp. 53.

⁵ *Toullier de Contrat*, § 27.

sition made by letter, should be sent by the post immediately succeeding its delivery, but it will be sufficient if an answer be posted on the day of the reception of the proposition.¹

§ 389. Where two parties simultaneously make a proposition upon the same subject-matter, by letter or message, neither knowing, at the time, of the proposition of the other, one proposal may, under some circumstances, become an acceptance of the other, although their terms be different. Thus, if one party should offer, by letter, to do a certain act, or to sell a certain article, or to make any contract for a certain consideration in money, and the other, being ignorant of such offer, should offer a larger price, the contract would be understood to be upon the smaller consideration, and would be perfect without further acceptance, following the maxim, "*quod minus est in obligationem videtur deductum.*" Thus, if A. should offer to lease his house to B. for \$500, and B. should, at the same time, offer \$600 rent for it, the proposition of A. would be understood to be accepted, and the rent would be \$500. The ground of such a rule is evident.²

§ 390. Again, where a party, after he has sent an offer or an order by letter, dies or becomes insane, and the other party accepts the offer, by placing his letter of acceptance in the mail, or forwards the goods, before his death, the heirs and representatives of such person sending the order or proposition will be bound in like manner as if no such event had occurred. Nor does it matter in this respect, that the letter of acceptance or the goods do not arrive until after his death or insanity.³ But if the orderer should die before the letter of acceptance is placed in the post, or before the goods are forwarded or pur-

¹ Dunlop v. Higgins, 1 House of Lords Ca. 381; Ib. 12 Jurist, 295.

² Toullier des Contrats, § 28; Pomponius, Leg. 12, et 109, ff. de V. O. 45, l. L. 52, ff. Locati 19, 2.

³ Mactier v. Smith, 6 Wend. R. 103; Pothier de Vente, No. 32; Averill v. Hedge, 12 Conn. R. 436.

chased, it would seem, that his heirs or representatives would not be bound thereby on the ground, that the offer or order being of a personal nature, could not survive him who made it.¹ Yet, if the person to whom the order or offer is sent,

¹ This rule is so laid down by Toullier, who says, (6 Toullier des Contrats, § 31, p. 34.): "Celui qui a fait les offres étant censé y persévérer jusqu'à leur acceptation, lorsqu'il n'a point manifesté de changement de volonté, on peut demander si elles peuvent être acceptées après sa mort, et après la mort de celui à qui elles ont été faites. La raison de douter est que l'héritier représente la personne du défunt, et que l'on est toujours censé, stipuler ou promettre pour soi et ses héritiers; d'où il paraîtrait résulter que les offres sont également faites pour soi et pour ses héritiers, à celui à qui elles sont faites et à ses héritiers, et par conséquent qu'elles peuvent être acceptées, après la mort de celui qui les a faites, comme après la mort de celui à qui elles l'ont été. Néanmoins, il faut dire que les offres ne peuvent être acceptées après la mort de l'un ni de l'autre. Sans doute on est censé stipuler ou promettre pour soi et pour ses héritiers, dans le sens que le droit acquis ou conféré par la stipulation ou par la promesse est transmis aux héritiers respectifs du créancier et du débiteur: l'intérêt de la société exige impérieusement cette transmission; mais la volonté ou le consentement réciproque qui doit former le contrat n'est pas transmissible de sa nature; c'est une chose tellement inhérente à la personne, qu'elle s'éteint avec elle, sans pouvoir passer à ses héritiers. Je puis persévérer dans la même volonté jusqu'à ma mort; mais cette volonté ne peut me survivre, elle meurt nécessairement avec moi. Mes offres sont donc par la nature même attachées à ma personne. La faculté de les accepter est également personnelle à celui à qui je les ai faites; elle ne peut passer à ses héritiers, ni faire partie de sa succession, puisqu'il n'avait aucun droit acquis avant sa mort. Si je consentais à contracter avec ses héritiers aux mêmes conditions que je lui avais offertes, ce serait un autre contrat que celui dont sa mort a rompu le projet, un contrat qui ne conférerait de droits qu'à ceux avec qui il serait passé, et du moment où il serait passé. En un mot, le décès de celui qui a fait les offres, ou le décès de celui à qui elles ont été faites, rompt nécessairement le projet du contrat commencé, parce que le concours des deux volontés ne peut plus exister. Mais le contrat est parfait, par l'acceptation faite avant le décès, quoiqu'elle n'ait pas encore été connue de l'autre partie. Ces principes élémentaires trouvent leur application dans la pratique. J'ai dessein de vendre ma maison à Titius; son ami se présente sans procuration, et passe le contrat, comme faisant et stipulant pour Titius, mais sans se *porter fort pour lui*, (1120). Puis-je révoquer mon consentement avant la ratification du contrat par Titius? Oui, sans doute, puisqu'il n'a aucun droit acquis, et que le contrat ne peut être considéré que comme une

being ignorant of the death of the party ordering, be put to any labor or expense, or subject himself to any responsibility, in consequence of the order, the heirs and representatives of the orderer would be bound to indemnify him therefor.¹ If, therefore, goods should be forwarded after the death of the orderer, but before knowledge of such fact reached the other party, the heirs and representatives would be bound to receive the goods, or to make full indemnity to the party sending them.² The converse of this rule would apply in case of the death of the party accepting the offer.

§ 391. Where goods not corresponding to the order are sent by mistake, it becomes important for the orderer to know, what it is incumbent on him to do. If he elect to keep the goods, he should give notice to the consignor, that they do not correspond to his order, and then he will only be liable for their actual worth; but if he accept them without such notice, and make no complaint, a presumption would arise, that they correspond to the order; which, although it may be rebutted by proof of the contrary, might perhaps occasion much inconvenience and expense.³ If he determine not to keep the goods,

offre de ma part. Titius meurt; ses héritiers peuvent-ils ratifier la vente malgré moi? Puis-je la révoquer malgré eux? Je puis révoquer; c'est une conséquence du principe que nous avons développé, et qui est fondé sur la raison. Il n'existe point de contrat avant la ratification de Titius, parce que les deux volontés n'ont pas concouru. S'il meurt, elles ne peuvent plus concourir. Si les héritiers de Titius ratifient, et que j'accepte leur ratification, ce sera un nouveau contrat, un contrat passé entre d'autres personnes, et qui n'aura point les effets qu'aurait eus le projet rompu par la mort de Titius. Si Titius était marié, la maison ne sera point un acquet de communauté, il n'y aura point de droit de mutation ouvert par la mort de Titius."

¹ Ibid.

² Pothier de Vente, No. 32.

³ Poulton v. Lattimore, 9 Barn. & Cres. 259; Fielder v. Starkin, 1 H. Black. R. 17; Adam v. Richards, 2 H. Black. R. 573; Street v. Blay, 2 Barn. & Adolph. 456; Greaves v. Ashlin, 3 Camp. R. 426; Maclean v. Dunn, 4 Bing. R. 726; Post.

it is also his duty to inform the consignor immediately of his determination, and to await his orders. If the consignor refuse or neglect to receive them, or transmit no orders, the orderer may proceed, after notice to the former, to sell them at public auction, and may charge the consignor with warehouse rent, and the expenses of keeping, during such a period of time after the refusal of the consignor, as is reasonably necessary to enable him to sell them.¹ If the consignors transmit special orders, after receiving information of the determination of the orderer not to keep the goods, of course, such orders are to be strictly obeyed. Where the articles sent are perishable, and the consignor is at a distance, so that it would be dangerous to await orders, the consignee is bound to sell them immediately on account of the consignor, and hold the proceeds to his credit; and then to give notice.

§ 392. Where a misunderstanding arises from the error of one of the parties, the person in fault must sustain the loss. As where terms are used in an order for goods which mislead the other party, he is not liable for the loss.² But where an offer has been made and accepted, if it be understood by the parties as a mere jest, it is not binding, although it be formal and complete.³

§ 392 *a*. Where a contract is made in writing, the signature of the parties need not be in full, the initials being sufficient, if accompanied with an intention on the part of the signer to bind himself.⁴

¹ *Caswell v. Coare*, 1 Taunt. R. 566; s. c. 2 Camp. R. 82; *Germaine v. Burton*, 3 Stark. R. 32; *Chesterman v. Lamb*, 4 Nev. & Man. 195; s. c. 2 Adolph. & Ell. 129; *Ellis v. Chinnock*, 7 Car. & Payne, 169; *McKenzie v. Hancock*, Ry. & Mood. 436; *King v. Price*, 2 Chitty, R. 416.

² *Adams v. Lindsell*, 1 Barn. & Ald. 681.

³ *Armstrong v. McGhee*, Addis. 261.

⁴ *Palmer v. Stephens*, 1 Denio, R. 471.

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§ 393. Assent must not only be mutual, but it must be freely and voluntarily given in order to create a valid contract. Compulsion or duress will therefore avoid any agreement. Duress is either by imprisonment or by threats, and must be upon the *person*. Duress of *goods* will not avoid a contract.¹ Where, therefore, to debt on an agreement to pay £19 10s. the defendant pleaded, that just before the making of the agreement, the plaintiff had wrongfully distrained goods of the defendant of the value of £20, under color of a distress for £19 10s., whereas only £3 7s. 6d. was due, and the plaintiff threatened to sell the goods, unless the defendant made the agreement, which the defendant accordingly made, in order to prevent the sale, it was held, that the withdrawal of the distress was a good consideration for the agreement to pay that amount, and that if it were not, mere duress of goods was not sufficient to invalidate the contract.² So, also, a threat to levy

¹ Atlee v. Backhouse, 3 Mees. & W. 650; Oates v. Hudson, 5 Eng. Law & Eq. R. 470; Chitty on Cont. 206; Sumner v. Ferryman, 11 Mod. 201, where it was holden that a bond could not be avoided by duress of goods. Astley v. Reynolds, 2 Str. 915; Sheppard's Touchstone, 61; Skeate v. Beall, 11 Adolph. & Ell. 983.

² Skeate v. Beale, 11 Adolph. & Ell. 983. In this case Lord Denman said: "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and with regard to the former, the law is laid down in 2 Inst. 483, and Sheppard's Touchstone, p. 61, and the distinction pointed out between duress of, or menace to, the person, and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert. It is not necessary now to enter into the consideration of cases in which it has been held that money paid to redeem goods wrongfully seized, or to prevent their wrongful seizure, may be recovered back in an action for money had and received; for

an execution would not be such duress as to make void a sum legally due.¹ But although a contract may not be avoided for duress of goods, yet where a sum of money is paid in order to obtain possession of goods which are wrongfully withheld, it can be recovered back.²

§ 393 *a*. In this country, however, it has been held, that duress of goods will, under some circumstances, render a contract voidable; and it has been said that such will be the case "where an unjust and unreasonable advantage is taken of a

the distinction between those cases and the present, which must be taken to be that of an agreement, not compulsory but voluntarily entered into, is obvious. *Lindon v. Hooper*, 1 Cowp. 414, and *Knibbs v. Hall*, 1 Esp. 84, are, however, authorities to show that, even if the money had been paid in this case, instead of the agreement to pay it entered into, no action for money had and received could have been sustained by the now defendant. For, although there is a difference in the circumstances, and the distress having been made, and some rent admitted to be in arrear, no replevin could have been successfully made, yet if the plaintiff distrained goods of the value of 20*l.*, when little more than 3*l.* were due, there is no doubt that, on payment of the value of the goods, or the sum claimed, an action would have lain for the excessive distress. And it is of great importance that parties should be holden to those remedies for injuries which the law prescribes, rather than allowed to enter into agreements with a view to prevent them, intending at the time not to keep their contracts. In the argument for the defendant, reliance was placed on the facts that the agreement was entered into under protest, and that the plaintiff must have known that only the smaller amount of rent was due. It is unnecessary to consider what the effect of these would have been; for neither of them is alleged in the plea. As, therefore, this plea relies solely on the menace as to the goods, under which the agreement was made, for avoiding it, we think it discloses no answer to the declaration.

¹ *Wilcox v. Howland*, 23 Pick. R. 167; *Waller v. Cralle*, 8 B. Monroe, R. 11. A note given for the release of property from an *illegal* levy of execution was held not void in *Bingham v. Sessions*, 6 Sm. & Marsh. 13.

² *Oates v. Hudson*, 5 Eng. Law & Eq. R. 469, and note; *Carey v. Prentice*, 1 Root, R. 91; *Chase v. Dwinal*, 7 Greenl. R. 134; *Ripley v. Gelston*, 9 Johns. R. 201; *Severance v. Kimball*, 8 N. Hamp. R. 386; *Elliott v. Swartwout*, 10 Peters, R. 138; *Parker v. Bristol Railway Co.* 7 Eng. Law & Eq. R. 528. See *Foshay v. Ferguson*, 5 Hill, 158; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211; *Nelson v. Suddarth*, 1 Hen. & Munf. 350.

man's necessities, by getting his goods into his possession, and there is no other speedy means left of getting them back again, but by giving a note or a bond; or where a man's necessities may be so great as not to admit of the ordinary processes of law to afford him relief;"¹ or where the contract is procured by threats of the destruction of property.²

§ 394. The general rule of law is, that imprisonment, under regular and formal legal process, does not constitute such duress as will invalidate the contract of the prisoner. *Executio juris non habet injuriam*.³ To constitute duress at law, the arrest must have been originally illegal, or have become so by the subsequent abuse of it.⁴ Yet where one caused another to be arrested on charge of felony, under a warrant from a justice of the peace, and discharged him upon his sealing a bond for £10, it was held, that the deed might be avoided, the proceedings being a mere pretext to cover the deceit. But this seems rather on the ground of fraud than of duress. If, therefore, a prisoner execute a deed or note, or make any other agreement, in order to obtain his freedom, it will be binding upon him, if he be legally imprisoned upon probable cause, and without malice; although the plaintiff actually have no

¹ *Collins v. Westbury*, 2 Bay, R. 211; *Sasportas v. Jennings*, 1 Bay, R. 470. See also *Nelson v. Suddarth*, 1 Hen. & Munf. 350.

² In *Foshay v. Ferguson*, 5 Hill, R. 158, Bronson, J., said: "I entertain no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress." There is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrongdoer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction."

³ 2 Bacon, Abr. Duress, A.; Co. Litt. 253; 2 Inst. 482; Bull. N. P. 172; 1 Black. Comm. 136; Chitty on Cont. 206; Sheppard's Touchstone, 61; *Stepney v. Lloyd*, Cro. Eliz. 647; *Shephard v. Watrous*, 3 Caines, R. 166; *Stouffer v. Latshaw*, 2 Watts, R. 167; *Watkins v. Baird*, 6 Mass. 511; *Alexander v. Pierce*, 10 N. Hamp. R. 494; *Eddy v. Herrin*, 17 Maine R. 338.

⁴ *Ibid.*

well-founded cause of action.¹ But if a man falsely, maliciously, and without probable cause, sue out a process, regular

¹ This doctrine is asserted, Lev. 68, where, after judgment, a defendant having no good cause of action, caused the plaintiff to be arrested and detained in prison, threatening him that if he would not seal a release, he should lie there and rot; and thereupon he sealed one and was discharged, and it was ruled by Bridgman, C. J., at Guildhall, that this release could not be avoided by duress, because he was in custody in the course of law, by the king's writ, when he sealed. The same rule is supported in *Waterer v. Freeman*, Sheppard's Touchstone, 62. Parsons, C. J., in *Watkins v. Baird*, 6 Mass. 511, says: "It is a general rule, that imprisonment by order of law, is 'not duress; but to constitute duress by imprisonment, either the imprisonment, or the duress after, must be tortious and unlawful. If, therefore, a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action. And although the imprisonment be lawful, yet, unless the deed be made freely and voluntarily, it may be avoided by duress. And if the imprisonment be originally lawful, yet if the party obtaining the deed detain the prisoner in prison unlawfully, by covin with the gaoler, this is a duress which will avoid the deed. But when the imprisonment is unlawful, although by color of legal process, yet a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided by duress of imprisonment. In *Allen*, 92, debt was sued on a bond, and duress of imprisonment pleaded in bar. The plaintiff had, on charging the defendant with felony in stealing a horse, procured a warrant from a justice, on which the defendant was arrested and imprisoned, and sealed the bond to the plaintiff to obtain his discharge, which was done, the horse appearing to be his own horse. Roll, J., directed the jury, that the proceedings being had to cover the deceit, the bond was obtained by duress.

"And in our opinion, it is a sound and correct principle of law, when a man shall falsely, maliciously, and without probable cause, sue out a process in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may be avoided by duress of imprisonment. For such imprisonment is tortious and unlawful as to the party procuring it; and he is answerable in damages for the tort, in an action for a false and malicious prosecution; the suing of legal process being an abuse of the law, and a proceeding to cover the fraud. And although Bridgman, in Lev. 68, 9, is made to say, that imprisonment in custody of law by the king's writ will not be duress to avoid a deed, when the arrest is without cause of action, because the party has his remedy by action of the case; yet this must be a mistake, as there is no remedy by action for

in form, to arrest and imprison another, and thereby obtain a deed from the party thus arrested, it may be avoided on account of duress of imprisonment; and the distinction between this case and the case before stated, resides in the malicious intention.¹ Where, therefore, there is an arrest for improper purposes, without just cause, or an arrest for just cause, but without lawful authority, or an arrest for a just cause with lawful authority, but for an improper purpose, and the person arrested pays money for his enlargement, he will be considered as having paid the money by duress of imprisonment, and may recover it in an action for money had and received.² If, however, a prisoner make an agreement to pay a just debt, while under legal imprisonment, he cannot avoid it on the ground of duress.³ The common law does not curiously inquire into the motives of the person causing the imprisonment, unless they are apparently malicious, but it contents itself, in common cases, with the presumption, that the process of law was sued out in good faith.

§ 395. In order to constitute duress by imprisonment, either the imprisonment, or the duress, consequent upon it, must be

suing a groundless suit, unless the suit be without probable cause, and malicious. And if it be, certainly the imprisonment is wrongful, as to the party who maliciously procured it." See also in Buller's N. P. 172, and in 1. Lilly, Abr. 494, tit. Duress, 6; Terms of the Law, tit. Duress, 163, (b.). The distinction asserted in the text, though it does not quite reconcile the cases, approaches the nearest to a solution of the difficulty. See *Watkins v. Baird*, 6 Mass. 511; *Richardson v. Duncan*, 3 N. Hamp. 508; *Nelson v. Suddarth*, 1 Hen. & Munf. 350; 20 Am. Jur. No. 39, p. 23.

¹ *Watkins v. Baird*, 6 Mass. 506; *Richardson v. Duncan*, 3 N. Hamp. R. 508.

² Chitty on Contracts, by Perkins, p. 207, note (1); *Richardson v. Duncan*, 3 N. Hamp. R. 508; *Nelson v. Suddarth*, 1 Hen. & Munf. 350; *American Jurist*, No. 39, p. 23; *Severance v. Kimball*, 8 N. Hamp. R. 386; *Fisher v. Shattuck*, 17 Pick. R. 252; *Whitefield v. Longfellow*, 13 Maine R. 146.

³ *Shephard v. Watrous*, 3 Caines, 168; 2 Inst. 482; 2 Leon. 239; Perk. § 18; *Crowell v. Gleason*, 1 Fairf. 325; *Meek v. Atkinson*, 1 Bailey, 84; *Severance v. Kimball*, 8 N. Hamp. R. 386; *Waller v. Cralle*, 8 B. Monr. R. 11.

tortious and unlawful.¹ If, therefore, while a person is illegally restrained and deprived of his liberty, he make a bond or any other agreement with the person restraining him, he may avoid it.² So, also, if the process, under which the party is arrested, be merely void for want of jurisdiction in the court issuing the warrant, the arrest is illegal, and any contract made by the prisoner may be avoided by him on account of duress. Thus, if he give a bail-bond, it cannot be enforced against him or his sureties.³

§ 396. If the imprisonment be lawful, and the prisoner be abused by force, or by unnecessary and unlawful privation, as of food, and be thereby induced to make a contract, it may be avoided by him. But the force or danger must be such, as may well overcome a firm man, and not *suspicio cujuslibet vani et meticulosi hominis*, and it must also be immediate.

§ 397. Duress by threat is divided by Lord Coke into four classes. Through fear, 1st. Of Loss of Life; 2d. Of Loss of Member; 3d. Of Mayhem; 4th. Of Imprisonment.

§ 398. The common law limits the application of the doctrine of duress by threats, to cases of *personal* restraint or injury; and having grown up in the feudal age, when every man was a soldier, dependent on his own arm for the carving out of his fortune, when literature and science were little heeded and less loved, and when home was a tent, or an armed castle,

¹ *Watkins v. Baird*, 6 Mass. 506; 2 Inst. 482. And a mortgage by one legally imprisoned, as security for the payment of a certain sum to the county, as the condition of a pardon, is not void for duress. *Rood v. Winslow*, 2 Doug. (Mich.), 68.

² 1 Black. Comm. 136.

³ *Cro. Eliz.* 647; 4 Inst. 47; *Thompson v. Lockwood*, 15 Johns. 256. See also *Norton v. Danvers*, 7 T. R. 376, where Lord Kenyon says, that a "bail-bond, executed by a person under arrest, where the affidavit to hold to bail is insufficient, may be avoided on the ground of duress." *Kavanagh v. Saunders*, 8 Greenl. 426; *Fisher v. Shattuck*, 17 Pick. 252.

the sympathies of the law were naturally with the person and not with the property, and it guarded more jealously the liberties and physical force of its freemen, than their fortunes and rights of property. A threat, therefore, to burn a house, or to destroy goods, was considered as void; for the law knew well that the swords of its subjects hung at their sides, and could guard their homes. But the loss of an arm struck a soldier from the ranks of those who could defend its majesty; and this could be ill sustained, while the wars were so deadly a canker to life, and while in the dungeons of strong barons, the sword might strike the unprotected head of the prisoner, or famine starve him into an agreement, at once lawless and oppressive.¹ But the reasons for this doctrine do not now apply, and the policy of a peaceful age would not perhaps agree with the harsher rule of the feudal law. Still the doctrine has never been overruled, and is at present the law.² It would, however, seem doubtful whether a threat to burn a house, or to destroy goods, would not now be considered as sufficient duress to avoid a contract.

§ 399. No person can avoid a contract for duress, unless the duress be imposed upon him personally; and if the parties, therefore, be forced into making a contract by duress inflicted upon only one of them, it can only be avoided by him, upon whom the duress was practised;³ for no one can avoid his own contract for the imprisonment or danger of any other than of himself. So, also, a surety is liable upon an agreement made

¹ 2 Inst. 483; Co. Litt. 253, b; Bacon, Abr. Duress, A.

² The reason given for this rule by Bacon, in his Abridgment, Duress, A. is, "that if he should suffer what is threatened, he may sue and recover damages in proportion to the injury done him." But this, as Mr. Starkie says, "is clearly a very inadequate reason for the distinction, and may frequently be false in fact." 2 Starkie on Evid. 482, (4th Am. ed.) See also Chitty on Cont. 208.

³ Bacon, Abr. Duress, B.; *Hanscombe v. Standing*, Cro. Jac. 187; *Baylie v. Clare*, 2 Brownl. 276; *Sheppard's Touchstone*, 62; *McClintick v. Cummins*, 3 McLean, 158.

by himself and principal, in order to relieve the latter only from duress.¹ This doctrine applies, however, only to specialties which are governed by the rules of the common law, and not to cases where there is a statute provision. If the contract of a surety be by parol, it will, in such circumstances, be void for want of consideration.²

§ 400. If duress be imposed by a stranger at the instance of the party who is to receive the benefit, it will invalidate the contract.³ It was formerly held, however, that if the duress was by a stranger, and the obligee was not a party thereto, that the agreement could not be avoided.⁴ But the better opinion seems now to be, that the party receiving the benefit of a deed so procured, cannot take advantage of it, whether he were a party to the duress or not. Such, also, is the rule of the Roman law.⁵ So, "if one threaten a man to kill or maim him, if he will not seal a deed to a stranger, and thereupon he do so, this is void, as if it were to the party himself. If one threaten a man to kill him, unless he will seal a deed to him and three others, and he do so, this is void as to all the four."⁶ But a threat by a party, that he will cause another to be imprisoned, is not such duress as to avoid a contract, unless the menace be of unlawful imprisonment. A threat to do a legal act, or to subject the party to the legal consequences of a refusal to make an agreement, is not duress.⁷ Thus, a threat

¹ *Mantel v. Gibbs*, 1 Brownl. 64; *McClintick v. Cummins*, 3 McLean, 158; *Hanscombe v. Standing*, Cro. Jac. 187; *Shep. Touch.* 62; *Thompson v. Lockwood*, 15 Johns. 256. This case, however, seems to come under the class of cases in which the contract is void for want of authority in the officer who exacts it. The contrary was held in *Fisher v. Shattuck*, 17 Pick. 252.

² *Evans v. Huey*, 1 Bay, 13.

³ 1 Roll. Abr. 688.

⁴ *Keilw.* 154, a.

⁵ *Heinneccius*, Elem. s. o. Pand. lib. 4, tit. 2; *Sheppard's Touchstone*, 61; *Jacob's Law Dict.*, Duress.

⁶ *Sheppard's Touchstone*, 61.

⁷ *Alexander v. Pierce*, 10 N. Hamp. R. 494; *Eddy v. Herrin*, 17 Maine R. 338.

by a judgment creditor to levy his execution is not such duress as to invalidate an agreement to pay the sum due, made in consequence thereof.¹ But a threat of unlawful imprisonment is duress.²

§ 401. The only exception to the rule that duress must be personal, is, that a husband can avoid a deed made by duress to his wife; for, by legal fiction, the husband and wife are but one person. But this exception is strictly confined to the relation of husband and wife, and does not extend to any other relationship between the parties.³

§ 402. Where there has been no actual contract, but compulsion has been used to extort money improperly, or where money has been paid under circumstances which give it the character of extortion, it may be reclaimed.⁴ Thus, where money was extorted under pretence of a toll, which was illegal, it was held that it could be reclaimed.⁵

§ 402 *a*. Where goods have been obtained by duress, and the wrongdoer is sued therefor, he cannot make title by showing, that he paid a part of their value, although he may claim

¹ *Wilcox v. Howland*, 23 Pick. R. 167; *Waller v. Cralle*, 8 B. Monr. 11.

² *Inhabitants of Worcester v. Eaton*, 11 Mass. R. 379.

³ The weight of authority is clearly to this effect; and so this doctrine is expressly laid down in *Sheppard's Touchstone*, 61, and by *Twisden, J.* in *Wayne v. Sands*, 1 Freeman, 351; but *Wilde, J.* in the same case, says, "If the duress be to a father or brother, and a son enter into bond, this is duress to the son, and he may plead it." So it is said in 2 Brownl. 276, "that a son may avoid his deed, by duress to his father, and so shall the father his deed, by reason of duress to the son." But *Bacon*, in his *Abridgment*, *Duress*, B. citing the case, and also 1 Roll. Abr. 687, puts a query against the doctrine. See *Simms v. Barefoot's Executors*, 2 Haywood, 402, in which the rule laid down in the text is maintained. But the rule is extended to father and son in *McClintick v. Cummings*, 3 McLean, 158.

⁴ *Chase v. Dwinal*, 7 Greenl. 134.

⁵ *Chase v. Dwinal*, 7 Greenl. 134; *Harmony v. Bingham*, 1 Duer, 209.

to have such payment taken into consideration in mitigation of damages.¹

§ 403. In all cases of duress, the threatening or imprisonment must, of course, be the alternative, held out by the other party, to the end of enforcing the making of the contract.²

§ 404. A contract made under duress may be ratified either by an express confirmation, or by acts from which a ratification will distinctly be implied. The ratification will be of no effect, however, unless it be freely and voluntarily made. Thus, if one while under duress make an obligation, and afterwards when he is at liberty, take a defeasance upon it, the obligation is thereby ratified.³ So, if a proper and formal acknowledgment be made of a bargain and sale of land, duress cannot afterwards be pleaded in avoidance of it.⁴ So, also, if a party under duress promise, on consideration that he shall be released from all restraint, that he will execute a bond or other instrument, and, afterwards, while he is perfectly free, perform his promise, it is not avoidable.⁵ For whether the original promise were void or not for duress, the subsequent promise is not open to the same objection. So, also, an acknowledgment of a deed by a feme covert, if she be privately examined by the magistrate, cannot be avoided for duress, on the ground that she might have obtained relief from such duress, if she had chosen.⁶

¹ *Foshay v. Ferguson*, 5 Hill, R. 154.

² *Sheppard's Touchstone*, 61.

³ *Ibid.* 62, 288.

⁴ *Ibid.*

⁵ 1 Roll. Abr. 687; *Bacon, Abr. Duress, C.*; *Inhabitants of Worcester v. Eaton*, 13 Mass. 377.

⁶ *Bissett v. Bissett*, 1 Harr. & McHen. 211. In Massachusetts, however, acknowledgment of a deed does not estop the party or his heirs from pleading duress. *Worcester v. Eaton*, 13 Mass. 371.

§ 405. By the common law, a contract made during duress is not void, but voidable; and the party on whom it is practised may avail himself of the duress, as a defence to an action thereupon at any time. But the party, who has employed the force, cannot allege it as a defence, if the contract be insisted upon by the other side. Duress must, however, be pleaded specially, and will not avail as a defence under a plea of *non est factum*.¹ By the Roman law, the party imposed upon must institute a process of rescission within ten years; and if he approve the contract for that space of time, either directly or by acquiescence therein, he cannot set it up as a defence.² That species of compulsion, which does not appear in overt acts of violence or threat, but in overpersuasion, and advantage taken by parties in peculiar relations of trust or influence over the weak and ignorant, comes within the purview of constructive fraud, and will be hereafter considered under that title.

§ 406. We now come to the third requisite of legal assent, namely, that it should be given understandingly, and without any material mistake in respect to the subject of the agreement. This subject we shall consider under the title of *Mistake*.

MISTAKE OF LAW.

§ 407. Mistake is of two kinds; mistake in matters of law, and mistake in matters-of-fact. With regard to the former class, it is a well-established maxim, both in law and equity, that ignorance of law is no excuse for any breach or omission of duty. *Ignorantia legis neminem excusat*. The legal presumption is, that every man of reasonable understanding knows the law, when he knows the facts; and this presump-

¹ Bacon, Abr. Duress, C.

² Evans's Pothier on Oblig. Part 1, Art. 3, § 2, p. 15.

tion, though arbitrary and false, is founded upon reasons of public policy; for, inasmuch as a thorough knowledge of the principles of law presupposes the studious labor of a life, and the application of that knowledge to many complicated questions of fact can only result in an opinion, in which there is no strict certainty, and from which other equally exercised and accomplished minds may differ, — without some arbitrary rule, imposing upon each man the duty of well considering and understanding the consequences of his own acts and contracts, there would be no limit to the excuse of ignorance, and no security in any agreement. Besides, the opposite rule would encourage ignorance, and rob knowledge and sagacity of its fair fruits; for if a party could claim to set aside his contract, on the ground that he was not acquainted with the legal rules governing it, it would be safer to be ignorant than to be wise. The law presumes, therefore, that every man, who makes a contract, makes it advisedly, and with a knowledge of its legal incidents and consequences; and although this rule, like all arbitrary rules, in some individual cases, works injury and injustice, and cuts the knot, which cannot be untied by law, it nevertheless serves to give stability and certainty to the general transactions of commerce which would otherwise be fluctuating and insecure. Whatever mistakes, therefore, a man may make in the law relating to his contracts, they will be binding, unless fraud or imposition be practised upon him.¹

¹ Doct. and Stud. Dial. 2, ch. 46. This subject has been much discussed and variously decided in the English courts. Lord Mansfield, in *Bize v. Dickason*, 1 T. R. 285, asserts the rule to have always been, "That if a man has actually paid what the law would not compel him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action." The doctrine of Lord Mansfield is supported by many authorities, namely, *Gibbons v. Caunt*, 4 Ves. R. 849; *Stockley v. Stockley*, 1 Ves. & Bea. 23; *Naylor v. Winch*, 1 Sim. & Stu. 555; *Ancher v. Bank of England*, 2 Doug. 637; *Perrott v. Perrott*, 14 East, 429; *Lansdowne v. Lansdowne*, 2 Jac. & Walk. 205; *Turner v. Turner*, 2 Rep. in

Thus, a promise to pay upon a supposed liability when there was really no such legal liability, will bind the party so agree-

Ch. 154. See also an able discussion of this question in the *American Jurist*, Vol. 23, p. 371.

The well-established doctrine in England at the present day, is that stated in the text, and most of the cases in which a different doctrine has been declared, have been marked by ingredients of fraud and surprise, or have not been purely cases of ignorance of law. The doctrine in the text is declared in *Bilbie v. Lumley*, 2 East, 471; *Brisbane v. Dacres*, 5 Taunt. 143; *Lowry v. Bourdieu*, 2 Doug. 468; *Stevens v. Lynch*, 12 East, 38; *Gomery v. Bond*, 3 Maule & Selw. 378; *East India Co. v. Tritton*, 3 Barn. & Cresw. 280; *Milnes v. Duncan*, 6 Barn. & Cres. 671; *Bramston v. Robins*, 4 Bing. 11; *Goodman v. Sayers*, 2 Jac. & Walk. 263; *Mildmay v. Hungerford*, 2 Ven. 243; *Marshall v. Collett*, 1 Younge & Coll. 232; Lord Cottenham, in *Stewart v. Stewart*, 6 Clarke & Finnelly, 966, has elaborately and critically examined all the cases, and arrived at the same conclusion which was confirmed by the House of Lords. *Kelly v. Solari*, 9 Mees. & Welsb. 54, 57, 58.

The same rule prevails in the Roman law and in foreign countries on the continent of Europe, where the Roman law prevails. See 3 Burge's Comm. on Col. and For. Law, 742. The question, however, whether money paid under a mistake of law can be recovered, has been much discussed by the civilians. Pothier and Heineccius maintain the negative, and Vinnius and D'Aguesseau the affirmative. Pothier, *Oblig. Pt. 4, ch. 3, § 1, n. 834*; Pothier, *Pand. Lib. 22, tit. 6*; *Comm. Ad. Leg. vii. de Jur. et Fact. Ignor. Heinec. ad Pand. Lib. 22, tit. 6, § 146*; *Cujacii Opera*, Tom. 4, p. 502, 506, 507; 1 *Domat, Civ. Law, B. 1, tit. 18, § 1, n. 13 to 17*. Sir W. D. Evans, in his notes to Pothier, (2 Evans's *Poth. Oblig.* 395,) insists that neither a payment nor a promise to pay under a mistake of law, are binding. See Evans's *Essay on the Action of money had and received*, ch. 1, § 1. The contrary doctrine is, however, declared in the Roman law. The *Digest*, *Lib. 22, tit. 6, l. 9, § 3, 5*; *Code, Lib. 1, tit. 18, l. 10*.

The English and Roman doctrine generally obtains in the United States, and was affirmed by the Supreme Court in the case of *Hunt v. Rousmaniere*, 1 Peters, S. C. R. 15. This case came up twice before the court; and on the first hearing, the opinion was delivered by Ch. J. Marshall, in which, after admitting the general doctrine as stated in the text, he says, "that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character." In the subsequent case of *Bank of U. S. v. Daniel*, 12 Peters, 32, the same principle was adhered to, and the remedial power of a court of equity to relieve against mistakes of law, was stated to be a doctrine rather grounded upon exceptions, than upon

ing. As where the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but

established rules. See also the New York decisions in *Shotwell v. Murray*, 1 Johns. Ch. R. 512; *Lyon v. Richmond*, 2 Johns. Ch. R. 51; *Storrs v. Barker*, 6 Johns. Ch. R. 166; *Lyon v. Tallmadge*, 14 Johns. 526; *Clarke v. Dutcher*, 9 Cow. R. 674; *Mowatt v. Wright*, 1 Wend. 355. So also in Alabama, *Jones v. Watkins*, 1 Stew. 81; in Connecticut, *Wheaton v. Wheaton*, 9 Con. 96; in New Hampshire, *Pinkham v. Gear*, 3 N. H. 163; and in Tennessee, *Hubbard v. Martin*, 8 Yerg. 498. The opposite doctrine obtains in Kentucky. *Fitzgerald v. Peck*, 4 Litt. 125; *Underwood v. Brockman*, 4 Dana, 309; and in South Carolina, *Lowndes v. Chisolm*, 2 McCord, Ch. 455; *Lawrence v. Beaubien*, 2 Bail. 623; *Hopkins v. Mazyck*, 1 Hill, Ch. 242. It has been held in Massachusetts, that a promise to pay under mistake of law is not binding. *May v. Coffin*, 4 Mass. 346; *Warder v. Tucker*, 7 Mass. 452; *Freeman v. Boynton*, 7 Mass. 488. See also *Haven v. Foster*, 9 Pick. 112, where the question is ably argued by counsel, and all the authorities bearing upon the question cited.

Although the general doctrine, as stated in the text, seems justified upon the ground of public policy; yet so arbitrary a rule, founded upon so harsh a presumption, should be modified by every exception, which can be introduced without negating its effect. And it would, as we think, be more coincident with justice, and better recommended to common sense, if an exception to the rule should be introduced in respect to promises of payment made upon a mistaken supposition of liability, or actual payments made under the same circumstances, when there was neither a moral nor legal obligation to support them. Indeed, the doctrine as stated by Lord Mansfield in *Bize v. Dickason*, 1 T. R. 285, and cited in the beginning of this note, and which was subsequently reaffirmed by him in *Ancher v. Bank of England*, 2 Doug. 637, seems to us to be the most equitable doctrine.

If there be, at the time that a contract is entered into, a mistake of the law applicable thereto, which entirely modifies it, to enforce such an agreement is to create a new contract, which was never assented to understandingly, and to impose duties and liabilities, which the party never contemplated assuming. So, also, if there be a promise, or an actual performance of a contract, upon the supposition of liability, that liability becomes the very basis of the contract, and its non-existence being an utter failure of consideration, an executory or executed contract founded thereupon, would, by one of the first principles relating to contracts, be wholly void. If money be paid away when it is not honestly due, the law, in refusing relief, allows the party receiving payment to take advantage of a mistake, made conscientiously and without negligence, and thereby to defraud the party making such payment. Besides this,

supposing himself to be still liable upon the bill in default of the acceptor, said, three months after it was due, that he knew that he was liable, and if the acceptor did not pay it, he would; it was held, that he was bound by such promise, and that his ignorance of the law was no defence.¹ And this rule would specially obtain where a written contract is made, notwithstanding one of the parties misapprehended the law applicable to it.² So, also, where a party sells an article, for which he has given a valuable consideration, fairly believing it to be his own, and it turns out to belong to another, he can-

a payment without consideration does not divest the property from the payer, and the payee, upon principle, becomes his bailee or trustee, and ought to be liable to an action of trover for a tortious conversion, unless he deliver it up. This arbitrary rule only destroys the remedy without affecting the right.

Besides, where money has been paid upon a mistake of law, or where a promise has been made upon a supposed liability, it is as much a mistake of fact, as of law. The liability or non-liability of any person is a plain fact, founded, to be sure, upon a legal principle, but still a fact independent of it, about which any one may be mistaken. And even if this be not so, why should not a man be allowed to recover money paid upon a mistaken belief of liability, when his mistake has formed the basis of his contract, and injuriously affected his rights, and when, without such mistake, the other party would have no claim upon him? It is not only unjust to the party making the payment, but it is a premium to the other party for taking advantage of his ignorance. Does not this strike a blow at good morals and fair dealing? Why, as between the two, should the law by its silence allow him, who has no right or title, to retain that which is the property of another?

Nor is this a case, in which there is any difficulty or want of certainty or proof, for, even *primâ facie*, no man pays away money which is not due, except as a gift or loan; and certainly the excuse of ignorance of law in such a case, is as complete and satisfactory a reason why the money ought not to be paid, as could be wished. See the able essay of D'Aguesseau on Mistakes of Law, and also that of Vinnius on the same subject, translated and appended to 2 Evans's Pothier on Oblig. 409, 437, as well as the essay of Sir W. D. Evans, in the same edition of Pothier, cited above.

¹ *Leslie v. Baillie*, 2 Y. & Coll. New Rep. 91, 96, 97. See *Stevens v. Lynch*, 12 East, R. 38. But see *contra*, *Warder v. Tucker*, 7 Mass. R. 449, and *May v. Coffin*, 4 Mass. R. 347, and *Logan v. Matthews*, 6 Barr, R. 417.

² *Strohecker v. Farmers Bank*, 6 Barr, R. 41.

not plead, in defence to an action for the price, that he did not mean to warrant it to be his own; because the law imports a warranty from the fact of his selling it.¹ So, also, if a party should give a release of all liability to a principal, he could not afterwards, in an action against the agent, plead, that he did not know the rule of law, which renders a release of a principal a release of his agent.² So, also, where in a contract between the complainant and defendant, the latter agreed to separate iron ore for the former at a specified price per ton, and the complainant, in a bill of equity brought upon the contract, stated, that at the time of making the contract, he was not aware of the existence of the provision in the Revised Statutes, declaring, that twenty hundred pounds, avoirdupois weight, should constitute a ton, but supposed that a ton was to be reckoned at twenty-two hundred and forty pounds, gross weight; it was held, that the ignorance of the statute law on the part of the complainant furnished no sufficient ground to reform the contract.³

¹ *Coolidge v. Brigham*, 1 Mete. R. 551; *Allen v. Hammond*, 11 Peters, R. 63; Story on Sales, § 367, and cases cited; Post, § 833.

² *Veazie v. Williams*, 3 Story, R. 628.

³ *Hall v. Reed*, 2 Barbour, Ch. R. 501. The Chancellor, in this case, commenting on the case of *Many v. The Beekman Iron Co.* 9 Paige, R. 188, distinguishes it from this case, and says: "The decision did not proceed upon the ground that it was competent for the court of chancery to make a contract for the parties which they had not intended to make for themselves. But the decision of this court, in that case, was based upon the fact that both parties had really agreed and intended to contract for the sale and purchase of the iron at the rate of 2,240 pounds to the ton, and not for iron to be delivered and paid for as statute tons. And that in reducing their verbal understanding and agreement to writing, the parties by mistake neglected to insert, in the written contract, the proper words to effectuate their agreement and understanding. In that case also, the defendants, by demurring, admitted the alleged understanding and agreement of the parties, as stated in the bill; and the existence of the particular facts which were relied on by the complainant as evidence of the actual understanding and intention of the parties, which by mistake they had neglected to put in writing in the proper language to express that intention."

§ 408. The citizens of one country are not presumed to know the laws of a foreign country, and ignorance or mistake with regard to them is considered as a mistake of fact, and not of law. In this respect, the laws of each of the different States in America, are foreign laws, of which the citizens of all the others are presumed not to be cognizant.¹

MISTAKE OF FACT.

§ 409. In the next place as to *Mistakes of Fact*.—Where an act is done, or a contract made, under an injurious mistake or ignorance of a material fact, it is voidable;² and this rule is not limited to cases, where there has been a fraudulent concealment and suppression of facts, but extends also to cases of innocent misapprehension and mistake. The ground of this distinction, between mistake or ignorance of law and mistake or ignorance of fact, is stated by Mr. Justice Story to be, “That as every man is presumed to know the law, and to act upon the rights which it confers, when he knows the facts, it is a culpable negligence in him to do an act or make a contract, and then set up his ignorance as a defence. But no person can be presumed to be acquainted with all matters-of-fact, nor is it possible by any degree of diligence to acquire that knowledge, and, therefore, an ignorance of facts does not import culpable negligence.”³ Another reason would seem to be, that public policy and the necessities of the case do not demand the same arbitrary rule in respect to mistake of facts, that is adopted in respect to mistakes of law,—since ignorance or mistake of fact is far more susceptible of proof and disproof by the rules of law, than mistakes of law,—and also, since such mistakes of fact as avoid a contract, are more inher-

¹ Haven v. Foster, 9 Pick. R. 112, 130; Norton v. Marden, 15 Maine R. 45; Raynham v. Canton, 3 Pick. R. 293; Story's Comm. Conflict of Laws, § 638.

² Haven v. Foster, 9 Pick. 129; Kelley v. Solari, 9 Mees. & Welsb. 54; 1 Story, Eq. Jurisp. § 140.

³ 1 Story, Eq. § 140, p. 159.

ent to it, and more necessarily productive of injury, than mistakes as to rules of law, which are extraneous to the contract. The law, therefore, wisely avoids establishing an arbitrary rule, where it is not absolutely necessary.

§ 410. The doctrine formerly obtained, that any mistake or ignorance of facts, which might, by an exercise of reasonable diligence, have been ascertained, would not be a sufficient ground to avoid a contract, for the reason, that no person ought to be privileged to take advantage of his laches.¹ *Lex vigilantibus non dormientibus subvenit.* But the later cases clearly affirm the doctrine, that a plain and palpable mistake or ignorance of facts will entitle the mistaken or ignorant party to avoid the contract, and even to recover money paid under such circumstances.² But if the attention of the party, making the mistake, be not directed to the matter, it is of no consequence whether the fact was never known to him, or whether, having been once known, he have utterly forgotten it; in each case the act or contract, being founded in a mistake or ignorance of the fact, is voidable.³ Thus, where an action was brought by one of the directors of an insurance company, to recover money paid to the defendant on an insurance on the life of her deceased husband, and it appeared that the policy had lapsed just before the death of the party, in consequence of the non-payment of the last quarterly premium, and that a memorandum of such fact was, by direction of the actuary, noted on the policy, but some weeks afterwards the defendant, as executrix of her husband, applied to the office for the payment of the policy, and the directors drew a check for the amount, having entirely forgotten that the policy had lapsed,—it was held, that the money could be recovered, it

¹ *Milnes v. Duncan*, 6 Barn. & Cres. 671; *Bilbie v. Lumley*, 2 East, R. 469.

² *Bell v. Gardiner*, 4 Mann. & Grang. 11; *Kelly v. Solari*, 9 Mees. & Welsb. 54; *Lucas v. Worswick*, 1 Mood. & Rob. 293; *Waite v. Leggett*, 8 Cowen, R. 195; *Wheadon v. Olds*, 20 Wend. R. 174.

³ *Kelly v. Solari*, 9 Mees. & W. 54; *Lucas v. Worswick*, 1 Mood. & Rob. 293.

having been clearly paid by mistake, although the mistake was occasioned by forgetfulness.¹ So, also, even if the party had the means of knowing the fact within his reach, he will not thereby be precluded from setting up his mistake of fact as a defence, unless when he did the act or made the contract, he intentionally waived all investigation with regard to the fact. Thus, where a bill of exchange, drawn by A. and indorsed by B., was subsequently altered by the holder, with the consent

¹ *Kelly v. Solari*, 9 Mees. & Welsb. 54. In this case Lord Abinger was, at first, of opinion that the directors could only recover, on showing that they had no knowledge or means of knowledge of the fact. But a rule *nisi* having been obtained to set aside the nonsuit, after full argument, he said, "I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question whether in reality the directors had a knowledge of the facts, and therefore that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say with precision what it amounts to; for example, it may be that the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of *Bilbie v. Lumley*, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule, however, is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might, by investigation, learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case, there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one, — where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment. I have little doubt in this case that the directors had forgotten the fact, otherwise I do not believe that they would have brought the action; but as Mr. Platt certainly has a right to have that question submitted to the jury, there must be a new trial."

of A., and was finally paid by B. by his promissory note, he being ignorant that it had been altered, but having had ample means of ascertaining the fact, his ignorance was held to be a good defence to an action on the note.¹

§ 411. An exception to this rule obtains in cases where the party making the mistake wilfully assumes the fact, or declines examination in respect to it, after his attention has been called thereto.² So, also, an exception would obtain, if the mistake

¹ *Bell v. Gardiner*, 4 Man. & Granger, 11. In this case, Tindall, C. J., said: "The question before the court arises upon a plea in answer to a declaration against the maker of a promissory note; in which plea the defendant alleges that the note was given under a mistake as to the facts, and, in effect, states that the defendant having indorsed a bill of exchange for the accommodation of the drawer, the bill was afterwards, without the defendant's knowledge, altered in a material point, so as to relieve him from his liability; that a demand being made upon him in respect of the bill, he gave the note in satisfaction of that demand, being ignorant at the time that he had been discharged from liability by the alteration of the bill. That is the general substance of the plea. Then the question is, whether this plea is sufficient without further alleging that the defendant, at the time he gave the note, was also without the means of knowledge of the alteration of the bill. Whatever doubts might have been created by the *dicta* in *Bilbie v. Lumley*, 2 East, 469, and other cases, it appears to me that the late case of *Kelly v. Solari*, 9 M. & W. 54, is decisive upon the point, and establishes that it is not necessary to the validity of such a plea that it should negative the existence of the means of knowledge as well as actual knowledge. We can, in fact, regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances; but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge, itself. There is no ground, therefore, for a rule for judgment *non obstante veredicto*. There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge; but I think, as the jury have found that the defendant had not knowledge, in fact, when he gave the note, that this rule must be discharged. I may add, however, that the case of the present defendant is, in my opinion, stronger in his favor than if the money had been actually paid over and was sought to be recovered back; for here the defendant stands upon the invalidity of the document which he is called upon to pay."

² *Kelly v. Solari*, 9 Mees. & Welsb. 54.

or ignorance were in respect to a matter which the party is bound by law imperatively to know, unless fraud or imposition were directly practised upon him. Yet this last exception applies principally, if not solely, to cases where public policy requires that the party mistaken should bear the consequences of his mistake, and where the other party is not at all in fault; such as a mistake in the payment of bank-notes and negotiable paper. Thus, if a bank receive payment in counterfeit notes, purporting to be its own issue, it will be bound thereby, because, by a rule of public policy, the officers of a bank are bound absolutely to know whether notes presented to them as their own are spurious or not.¹ Again, if the drawee

¹ Gloucester Bank v. Salem Bank, 17 Mass. R. 33; Levy v. Bank of U. S. 4 Dall. R. 234; Bank of U. S. v. Bank of Georgia, 10 Wheat. R. 333. In this case Mr. Justice Story said: "This is a case of great importance in a practical view, and has been very fully argued upon its merits. The Bank of Georgia having originally issued the bank-notes in question, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States, as cash, by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which, notice was duly given, and a tender of the notes was made to the Bank of the United States, and by them refused. Both parties are equally innocent of the fraud, and it is not disputed that the Bank of the United States were holders *bonâ fide*, for a valuable consideration. Under these circumstances, the question arises, which of the parties is to bear the loss, or, in other words, whether the plaintiffs are entitled to recover, in this action, the amount of this deposit.

"Some observations have been made as to the form of the action, the declaration embracing counts for the balance of an account stated, as well as for money had and received, &c. But, if the plaintiffs are entitled to recover at all, we see no objection to a recovery upon either of these counts. The sum sued for is the balance due upon the general account of the parties, and it is money had and received to the use of the plaintiffs, if the transaction entitled the plaintiffs to consider the deposit as money. It is, clearly, not the case of a special deposit, where the identical thing was to be restored by the defendants; the notes were paid as money upon general account, and deposited as such; so that, according to the course of business, and the understanding of the parties, the identical notes were not to be restored, but an equal amount in cash. They passed, therefore, into the general funds of the Bank of Geor-

of a bill of exchange accept a counterfeit bill, or if the maker of a promissory note, or drawer of a bill of exchange pay a

gia, and became the property of the bank. The action has, therefore, assumed the proper shape, and if it is maintainable upon the merits, there is no difficulty in point of form.

"We may lay out of the case, at once, all consideration of the point, how far the defendants would have been liable, if these notes had been notes of any other bank, deposited by the plaintiff, in the Bank of Georgia, as cash. That might depend upon a variety of considerations, such as the usages of banks, and the implied contract resulting from their usual dealings with their customers, and upon the general principles of law applicable to cases of this nature. The modern authorities certainly do, in a strong manner, assert, that a payment received in forged paper, or in any base coin, is not good; and that if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. To this effect are the authorities cited at the bar, and particularly *Markle v. Hatfield*, 2 Johns. R. 455; *Young v. Adams*, 6 Mass. R. 182; and *Jones v. Ryde*, 5 Taunt. R. 488. But, without entering upon any examination of this doctrine, it is sufficient to say, that the present is not such a case. The notes in question were not the notes of another bank, or the security of a third person, but they were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner. They were treated as cash, and carried to the credit of the plaintiff in the same manner, and with the same general intent, as if they had been genuine notes or coin.

"Many considerations of public convenience and policy would authorize a distinction between cases where a bank receives forged notes purporting to be its own, and those where it receives the notes of other banks in payment or upon general deposit. It has the benefit of circulating its own notes as currency, and commanding thereby the public confidence. It is bound to know its own paper, and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions. In point of fact, it is well known, that every bank is in the habit of using secret marks, and peculiar characters, for this purpose, and of keeping a regular register of all the notes it issues, so as to guide its own discretion as to its discounts and circulation, and to enable it to detect frauds. Its own security, not less than that of the public, requires such precautions.

"Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty, which the public have a right to require. And in respect to persons equally innocent, where one is bound

spurious note or bill, he cannot recover the money paid; because public policy demands that every person, before paying

to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery had not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will, therefore, presume a damage actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification ingrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility.

"If, indeed, we were to apply the doctrine of negligence to the present case, there are circumstances strong to show a want of due diligence and circumspection on the part of the Bank of Georgia. It appears from the statement of facts, that all the genuine notes of that bank of the denomination of one hundred dollars, in circulation at this time, were marked with letter A; whereas twenty-three of the forged notes of one hundred dollars bore the marks of the letter B, C, and D. These facts were known to the defendants, but unknown to the plaintiffs; so that by ordinary circumspection the fraud might have been detected.

"The argument against this view of the subject, derived from the fact, that the defendants have received no consideration to raise a promise to pay this sum, since the notes were forgeries, is certainly not of itself sufficient. There are many cases in the law, where the party has received no legal consideration, and yet in which, if he has paid the money, he cannot recover it back; and in which, if he has merely promised to pay, it may be recovered of him. The first class of cases often turns upon the point, whether in good faith and conscience the money can be justly retained; in the latter, whether there has been a credit thereby given to or by a third person, whose interest may be materially affected by the transaction. So that, to apply the doctrine of a want of consideration to any case, we must look to all the circumstances, and decide upon them all.

"Passing from these general considerations, it is material to inquire how,

such a note or bill, should assure himself that it is his, he having the sole means of knowledge in himself, beyond the coun-

in analogous cases, the law has dealt with this matter. The present case does not, indeed, appear to have been in terms decided in any court; but if principles have been already established, which ought to govern it, then it is the duty of the court to follow out those principles on this occasion.

"The case has been argued in two respects; first as a case of payment, and, secondly, as a case of acceptance of the notes.

"In respect to the first, upon the fullest examination of the facts, we are of opinion, that it is a case of actual payment. We treat it, in this respect, exactly as the parties have treated it, that is, as a case where the notes have been paid and credited as cash. The notes have not been credited as notes, or as special deposit; but the transaction is precisely the same as if the money had been first paid to the plaintiffs, and instantaneously the same money had been deposited by them. It can make no difference that the same agent is employed by both parties, the one to receive, and the other to pay and credit. Upon what principle is it, then, that the court is called upon to construe the act different from the avowed intention of the parties? It is not a case where the law construes an act done with one intent to be a different act, for the purpose of making it available in law; to do that, *cy pres*, which would be defective in its direct form. Here the parties were at liberty to treat it as they pleased, either as a payment of money, or as a credit of the notes. In either way it was a legal proceeding, effectual and perfect; and as no reason exists for a different construction, we think that the parties, by treating it as a cash deposit, must be deemed to have considered it as paid in money, and then deposited; since that is the only way in which it could legally become, or be treated as cash. Nor is there any novelty in this view of the transaction. Bank-notes constitute a part of the common currency of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed, in *Miller v. Race*, 1 Burr. R. 457, they are not, like bills of exchange, considered as mere securities or documents for debts. If this be true in respect to bank-notes in general, it applies, *a fortiori*, to the notes of the bank which receives them; for they are then treated as money received by the bank, being the representative of so much money admitted to be in its vaults for the use of the depositor. The same view was taken of this point in the case of *Levy v. The Bank of the United States*, 4 Dall. R. 231; 1 Binn. R. 27, where a forged check had been accepted by the bank and carried to the credit of the plaintiff (a depositor) as cash, and upon a subsequent discovery of the fraud, the bank refused to pay the amount. The court there

terfeiter; and also because, between two innocent parties, if the negligence of one occasion loss to him, there is no reason

said, 'it is our opinion, that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it should so be taken. In the latter case, the bank would have appeared as plaintiffs; and every mistake which could have been corrected in an action by them, may be corrected in this action, and none other.' The case of *Bolton v. Richards*, 6 T. R. 139, is not, in all its circumstances, directly in point; but there, the court manifestly considered the carrying of a check to the credit of a party was equivalent to the transfer of so much money in the hands of the banker, to his account.

"Considering, then, the credit in this case as a payment of the notes, the question arises, whether, after payment, the defendants would be permitted to recover the money back; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit.

"In *Price v. Neal*, 3 Burr. R. 1355, there were two bills of exchange, which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, 'here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it. But it was not incumbent upon the defendant to inquire into it. There was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up. The other bill he actually accepts, after which, the defendant innocently and *bonâ fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having without any scruple or hesitation, paid the first; and he paid the whole value *bonâ fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But, in this case, if there was any fault or negligence in any one,

why he should throw the burden of that loss upon the other.¹ Of course, the payer of a promissory note would have his

it certainly was in the plaintiff, and not in the defendant.' The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it before the time it was paid or acknowledged. So that there is no pretence to allege, that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of *Price v. Neal* has never since been departed from; and, in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority. The case of *Smith v. Mercer*, 6 Taunt. R. 76, was a stronger application of the principle. There, the acceptance was a forgery, and it purported to be payable at the plaintiff's who was a banker, and paid it, at maturity, to the agent of the defendant, who paid it in account with the defendant. A week afterwards the forgery was discovered, and due notice given to the defendant. But the court (Mr. Justice Chambre dissenting) decided, that the plaintiff was not entitled to recover. Two of the judges proceeded upon the ground, that the banker was bound to know the handwriting of his customers; and that there was a want of caution, and negligence on the part of the plaintiff. The chief justice, without dissenting from this ground, put it upon the narrower ground, that during the whole week the bill must be considered as paid, and if the defendant were now compelled to pay the money back, he could not recover against the prior indorsers; so that he would sustain the whole loss from the negligence of the plaintiff. The very case occurred in the *Gloucester Bank v. The Salem Bank*, 17 Mass. R. 33, where forged notes of the latter had been paid to the former, and, upon a subsequent discovery, the amount was sought to be recovered back. The authorities were there elaborately reviewed both by the counsel and the court, and the conclusion to which the latter arrived was, that the plaintiffs were not entitled to recover, upon the ground, that by receiving and paying the notes, the plaintiffs adopted them as their own, that they were bound to examine them when offered for payment, and if they neglected to do it within a reasonable time, they could not afterwards recover from the defendants a loss occasioned by their own negligence. In that case, no notice was given of the doubtful character of the notes until fifteen days after the receipt, and no actual averments

¹ *Bank of U. S. v. Bank of Georgia*, 10 Wheat. R. 333; *Price v. Neal*, 3 Burr. R. 1355; *Smith v. Mercer*, 6 Taunt. R. 76.

remedy against the counterfeiter in such case. This exception only applies to cases where the payee of the note or bill

of forgery until about fifty days. The notes were in a bundle when received, which had not been examined by the cashier until after a considerable time had elapsed. Much of the language of the court as to negligence is to be referred to this circumstance. The court said, 'the true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength, when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own.'

"Against the pressure of these authorities there is not a single opposing case; and we must, therefore, conclude, that both in England and America, the question has been supposed to be at rest. The case of *Jones v. Ryde*, 5 Taunt. Rep. 488, is clearly distinguishable, as it ranged itself within the class of cases, where forged securities of third persons had been received in payment. *Bruce v. Bruce*, 5 Taunt. Rep. 495, is very shortly and obscurely reported; but from what is there mentioned, as well as from the notice taken of it by Lord Chief Justice Gibbs, in *Smith v. Mercer*, 6 Taunt. Rep. 77, it must have turned on the same distinction as *Jones v. Ryde*, and was not governed by *Price v. Neal*.

"But if the present case is to be considered, as the defendants' counsel is most solicitous to consider it, not as a case where the notes have been paid, but as a case of credit, as cash, upon the receipt of them, it will not help the argument. In that point of view, the notes must be deemed to have been accepted by the defendants as genuine notes, and payment to have been promised accordingly. Credit was given for them, as cash, by the defendants, for nineteen days, and, during all this period, no right could exist in the plaintiffs to recover the amount against any other person, from whom they were received. By such delay, according to the doctrine of Lord Chief Justice Gibbs, in *Smith v. Mercer*, 6 Taunt. Rep. 76, the prior holders would be discharged; and the case of *The Gloucester Bank v. The Salem Bank*, 17 Mass. Rep. 33, adopts the same principle; so that there would be a loss produced by the negligence of the defendants. But waiving this narrower view, we think the case may be justly placed upon the broad ground, that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts. If there be any difference between

is an innocent party, and where the person making the mistake is a party to the bill, or note, or negotiable paper. And, there-

them, the principle is stronger here than there; for there the acceptor is presumed to know the drawer's signature. Here, *a fortiori*, the maker must be presumed, and is bound to know his own notes. He cannot be heard to aver his ignorance; and when he receives notes, purporting to be his own, without objection, it is an adoption of them as his own.

"The general question as to the effect of acceptances, has repeatedly come under the consideration of the courts of common law. In the early case of *Wilkinson v. Lutwidge*, 1 Str. 648, the lord chief justice considered that the acceptance of the bill was, in an action against the acceptor, a sufficient proof of the handwriting of the drawer; but it was not conclusive. In the subsequent case of *Jenys v. Fawler*, 2 Str. 946, the lord chief justice would not suffer the acceptor to give the evidence of witnesses, that they did not believe it the drawer's handwriting, from the danger to negotiable notes; and he strongly inclined to think that actual forgery would be no defence, because the acceptance had given the bill a credit to the indorsee. Subsequent to this was the case of *Price v. Neal*, already commented on, in which it was thought that the acceptor ought to be conclusively bound by his acceptance. The correctness of this doctrine was recognized by Mr. Justice Buller, in *Smith v. Chester*, 1 T. R. 655, by Lord Kenyon, in *Barber v. Gingell*, 3 Esp. Rep. 60, where he extended it to an implied acceptance; and by Mr. Justice Dampier, in *Bass v. Clive*, 4 M. & Selw. 15, and it was acted upon by necessary implication by the court, in *Smith v. Mercer*, 6 Taunt. Rep. 76. In *Levy v. The Bank of the United States*, 1 Binn. 27, already referred to, where a forged check, drawn upon the bank, had been accepted by the latter, and carried to the credit of the plaintiff, and on the refusal of the bank afterwards to pay the amount, the suit was brought, the court expressly held the plaintiff entitled to recover, on the ground that the acceptance concluded the defendant. The case was very strong, for the fraud was discovered a few hours only after the receipt of the check, and immediate notice given. But this was not thought in the slightest degree to vary the legal result. 'Some of the cases,' said the court, 'decide that the acceptor is bound, because the acceptance gives a credit to the bill, &c. But the modern cases certainly notice another reason for his liability, which we think has much good-sense in it, namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself.' After some research, we have not been able to find a single case, in which the general doctrine, thus asserted, has been shaken, or even doubted; and the diligence of the counsel for the defendants on the present occasion has not been more successful than our own. Considering, then, as we do, that the doctrine is well

fore, if a person, not being a party thereto, discount it, supposing it to be good, and it prove to be a forgery, he may recover it on the ground that it is paid under a mistake of fact, for such person is not bound to know, whether the bill is forgery, or not, in like manner as if he were a party on the face of the note or bill.¹ And in case a bill or note should be discounted by a third person, the money paid on it could be recovered, if it prove to be a forgery, although it be not indorsed by the person in whose behalf it was discounted.² For the vendor of any bill of exchange impliedly warrants it to be of the kind and description it purports on its face to be, although he do not indorse it.³ But it seems, that the person discount-

established, that the acceptor is bound to know the handwriting of the drawer, and cannot defend himself from payment by a subsequent discovery of the forgery, we are of opinion that the present case falls directly within the same principle. We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their act of adoption, and cannot be permitted to set up the defence of forgery against the plaintiffs.

"It is not thought necessary to go into a consideration of other cases cited at the bar, to establish, that the acceptor may show that the accepted bill was void in its origin, as made in violation of the stamp act, &c.; for all these cases admit the genuineness of the notes, and turn upon questions of another nature, of public policy, and a violation of the laws of the land. Nor are the cases applicable, in which bills have been altered after they were drawn, or of forged indorsements, for these are not facts which an acceptor is presumed to know. Nor is it deemed material to consider in what cases receipts and stated accounts may be opened for surcharge and falsification. They depend upon other principles of general application. It is sufficient for us to declare, that we place our judgment, in the present case, upon the ground that the defendants were bound to know their own notes, and having received them without objection, they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved, for potential loss may exist, and the law will always presume a possible loss in cases of this nature."

¹ *Jones v. Ryde*, 1 Marsh. R. 157; s. c. 5 Taunt. R. 488; *Cocks v. Masterman*, 9 Barn. & Cres. 905; *Young v. Cole*, 3 Bing. N. C. 730.

² *Fuller v. Smith, Ryan & Mood*. 49.

³ *Gompertz v. Bartlett*, 24 Eng. Law & Eq. R. 156.

ing it should give notice that it is a forgery to the indorser on the day it becomes due, so as to enable him to give notice to the antecedent parties, or he cannot recover.¹

§ 412. The mistake must, however, be in regard to a material fact, affecting and modifying the act or contract. For if it be in respect of a trifling and insignificant matter, it will not be a good defence to an executory agreement, nor a good claim for recovery upon an executed contract. Thus, where a mistake of a quarter of an acre was made in a sale of twenty acres, the premises being well known to both parties, it was held to be no good ground for rescinding the contract, inasmuch as the mistake could not have operated materially to affect the purchase.² Yet, if the exact quantity or number of the subject-matter be of the essence of a contract, as if the contract be entire, a slight mistake might be sufficient to avoid it. Thus, if an article be bought for a definite purpose, any mistake as to quantity, though very slight, which would, nevertheless, render it unfit for the purpose, would afford a ground to avoid the sale.³

§ 413. Again, where there is a misdescription of the subject-matter of a contract, not arising from fraud, but founded in mistake, ignorance, or carelessness, if it be in a substantial and material point, so affecting the contract as that it may reasonably be supposed, that but for such misdescription the contract would not have been made, it will afford a good ground to avoid the contract.⁴ Thus, where a sale was made of the

¹ *Wilkinson v. Johnson*, 3 Barn. & Cres. 428; *Cocks v. Masterman*, 9 Barn. & Cres. 902; *Smith v. Mercer*, 6 Taunt. 76; *Story on Bills*, § 111, 225, 262, 263, 413, 451.

² *Smith v. Evans*, 6 Binn. 102; *Mann v. Pearson*, 2 Johns. R. 37; 1 *Story, Eq. Jurisp.* § 141.

³ *Ante*, § 16.

⁴ *Flight v. Booth*, 1 Bing. N. C. 376. In this case, Tindal, C. J., said: "It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particu-

lease of a house, which was described to be "a free public-house," and when the lease was made, it contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery, it was held, that the misdescription was fatal to the contract.¹ So, also, where parties made an agreement for the purchase and sale of an interest in a public-house, which was stated to have eight years and a half to run, and it turned out that the buyer had only an interest of six years, it was held, that the buyer might treat the contract as a nullity, and recover the purchase-money advanced by him.² So, where an article was sold under the name of foreign refined rape oil, but warranted only equal to sample, and oil was delivered which in fact corresponded to the sample, but was not foreign refined rape oil, it was held the purchaser was not bound to accept it.³

lars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk v. Worthy*, 1 Camp. 340; *Wright v. Wilson*, 1 Mood. & Rob. 207; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Edney*, 3 Camp. 285; *Waring v. Hoggart*, 1 Ry. & Mood. 39; and *Stewart v. Alliston*, 1 Mer. 26. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

¹ *Jones v. Edney*, 3 Camp. R. 285.

² *Farrer v. Nightingal*, 2 Esp. R. 639.

³ *Nichol v. Godts*, 26 Eng. Law & Eq. R. 527.

§ 414. In cases of sales of personal property, where the mistake is in respect to the title of the vendor of the subject-matter, and he proves to have no title at all, the contract may be entirely avoided, and the vendee may avail himself of such fact as a defence to an action for the consideration money; or he may wholly abandon the contract; or he may reclaim the purchase-money, if he have advanced it.¹ But if the vendee

¹ Story on Sales, § 188, § 203; *Bradeen v. Brooks*, 22 Maine R. 463; Cod. Nap. art. 1599. The decisions upon this point are most embarrassing and contradictory, and the comment of Mr. Chancellor Kent will be instructive. He says: "On the subject of the claim to a completion of the purchase, or to the payment or return of the consideration money, in a case where the title or the essential qualities of part of the subject fail and there is no charge of fraud, the law does not seem to be clearly and precisely settled; and it is difficult to reconcile the cases, or make the law harmonize on this vexatious question. The rules on this branch of the law of sales are in constant discussion, and of great practical utility, and they ought to be distinctly understood. It would seem to be sound doctrine, that a substantial error between the parties concerning the subject-matter of the contract, either as to the nature of the article, or as to the consideration, or as to the security intended, would destroy the consent requisite to its validity. The principles which govern the subject, as to defects in the quality or quantity of the thing sold, require a more extended examination; and they are the same in their application to sales of lands and chattels.

"In the case of a purchase of land, where the title in part fails, the court of chancery will decree a return of the purchase-money, even after the purchase has been carried completely into execution, by the delivery of the deed and payment of the money, provided there had been a fraudulent misrepresentation as to the title. But if there be no ingredient of fraud, and the purchaser is not evicted, the insufficiency of the title is no ground for relief against a security given for the purchase-money, or for rescinding the purchase, and claiming restitution of the money. The party is remitted to his remedies at law on his covenants to insure the title. In *Frisbie v. Hoffnagle*, the purchaser, in a suit at law upon his note given to the vendor for the purchase-money, was allowed to show in his defence, in avoidance of the note, a total failure of title, notwithstanding he had taken a deed with full covenants, and had not been evicted. But the authority of that case and the doctrine of it, were much impaired by the supreme court in Maine, in a subsequent case, founded on like circumstances; and they were afterwards in a degree restored by the doubts thrown over the last decision by the Supreme Court of Massachusetts in *Knapp v. Lee*. The same defence was made to a promissory note

still retain undisturbed possession of the property sold, and *a fortiori* if no claim be made against him by an adverse party, he cannot plead want of title in the vendor, in defence of an action for the price.¹ This rule, however, does not hold in

in the case of *Greenleaf v. Cook*, and it was overruled on the ground that the title to the land, for the consideration of which the note was given, had only partially failed; and it was said, that to make it a good defence in any case, the failure must be total. This case at Washington is contrary to the defence set up and allowed, and to the principle established, in the case of *Gray v. Handkinson*; but it seems to be supported by the case of *Day v. Nix*, where it was decided by the English court of C. B., that a partial failure of the consideration of a note was no defence, provided the quantum of damages arising upon the failure was not susceptible of definite computation. The cases are in opposition to each other, and they leave the question how far and to what extent, a failure of title will be a good defence, as between the original parties to an action for the consideration money on a contract of sale, in a state of painful uncertainty. I apprehend that in sales of land the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money even on a failure of title. This is the strict English rule, both at law and in equity; and it applies equally to chattels, when the vendor sells without any averment of title, and without possession. In sales of chattels, the purchaser cannot resist payment in cases free from fraud, while the contract continues open, and he has possession. But in this country the rule has received very considerable relaxation. In respect to lands, the same rule has been considered to be the law in New York; while, on the other hand, in South Carolina, their courts of equity will allow a party suffering by the failure of title, in a case without warranty, to recover back the purchase-money, in the sale of real as well as of personal estates."

¹ *Kennebec Log Driving Co. v. Burrill*, 18 Maine R. 314; *Case v. Hall*, 24 Wend. R. 102; *Vibbard v. Johnson*, 19 Johns. R. 77; *Whitney v. Lewis*, 21 Wend. R. 132; *Lloyd v. Jewell*, 1 Greenl. R. 352; *Sumner v. Gray*, 4 Pike (Ark.) R. 467. But see *contra*, *Frisbee v. Hoffnagle*, 11 Johns. R. 50; *Knapp v. Lee*, 3 Pick. R. 452. This rule also obtains in the Roman law, for in the contract of sale the seller was not understood to warrant his title to the goods sold, but only to agree to defend his possession; nor in the old French law, which followed the Roman law. The Code Napoleon has, however, settled the question otherwise in France, by declaring, in the 1599th article, that "*la vente de la chose d'autrui est nulle.*" See Pothier on Cont. No. 1; Story on Sales, § 7.

sales of real property; and in such cases the vendee cannot utterly disclaim the sale, but is put to his remedy on the covenants in his deed.¹

§ 415. Where the want of title is only *partial*, — as if goods be sold, which are under mortgage, — the vendee may avoid the sale, and reclaim the purchase-money, which he may have advanced, if the incumbrance materially diminish the value of the thing sold, and go to the essence of the contract.² The same rule applies where the title of the vendor fails as to a part of a mass or number of goods sold. If the whole number be a material inducement to the sale in fact; or if the contract be entire, so as to render the whole a material inducement in law, the buyer may treat the sale as void.³ But if the quantity, in respect to which the title fails, be slight and unimportant;⁴ or if, being material, the vendee choose to keep it, without objection; or if, the contract being entire, the vendee accept the portion in respect to which the title is good, the only effect of the mistake would be to reduce the price proportionally to the failure.⁵

¹ *Mandeville v. Welch*, 5 Wheat. R. 277; *Greenleaf v. Cook*, 2 Wheat. R. 13.

² *Farrer v. Nightingal*, 2 Esp. R. 639; *Curtis v. Hannay*, 3 Esp. R. 82; *Hammond v. Allen*, 2 Sumner, R. 394; s. c. 11 Peters, R. 70.

³ *Farrer v. Nightingal*, 2 Esp. R. 639. In this case, Lord Kenyon said: "I have often ruled, that where a person sells an interest, and it appears that the interest, which he pretended to sell, was not a true one; as, for example, if it was for a lesser number of years than he had contracted to sell, the buyer may consider the contract as at an end; and bring an action for money had and received, to recover back any sum of money he may have paid in part performance of the agreement for the sale; and though it is said here, that upon the mistake being discovered in the number of years of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case. It is sufficient for the plaintiff to say, That is not the interest which I agreed to purchase." *Johnson v. Johnson*, 3 Bos. & Pul. 170; Ante, § 16, 17.

⁴ *Stebbins v. Eddy*, 4 Mason, 414.

⁵ *Johnson v. Johnson*, 3 Bos. & Pul. 170.

§ 416. Again, a mistake may arise in respect to the quantity or number of things included in a contract. As, for instance, where, in the sale of a certain set of articles, a purchaser supposes himself to be buying the whole at a particular price, while the seller supposes him to offer that price for a part only; and, in such cases, no contract arises, for want of mutuality of agreement. So, also, if a lessee should suppose that his lease was to include a particular room or set of rooms, which the lessor did not intend to let, the contract would be void, if the mistake were material.¹ And the same rule would apply, where premises were sold for the residue of a term, of which both parties supposed that only eight years were unexpired, the price being founded on that supposition, if it should afterwards appear that twenty years were, in fact, unexpired.²

§ 417. Where a mistake arises in regard to the quality or value of the subject-matter of a contract, the contract will be binding, unless there be a breach of covenant or warranty; and in such cases, the mere mistake would not vitiate the contract;³ particularly if the other party had the means of avoiding the mistake by inquiry.⁴

§ 418. Where an agreement relates to a particular person, in whom a personal trust and confidence are reposed, a mistake respecting the individual, will vitiate the agreement. Thus, in the case of a promise to marry, or of an agreement to sell upon credit, or of a loan or gift, a mistake of the particular person intended, avoids the contract. So, also, if A. agree to sell on credit to B., mistaking him for C., and reposing a special confidence in the solvency and honor of C., the mistake

¹ 1 Story, Eq. Jur. § 144; *Calverley v. Williams*, 1 Ves. Jr. 210; *Milligan v. Cooke*, 16 Ves. R. 1; *Poole v. Shergold*, 1 Cox, Cas. 273; *Brown on Sales*, § 217.

² *Okill v. Whittaker*, 2 Phillips, (Eq.) R. 338; s. c. 11 Jurist, (Eng.) 681.

³ See post, *Sales*, § 826, et seq.

Warner v. Daniels, 1 Woodbury & Minot, 91.

would avoid the sale. And, an agreement to sell to a particular firm, described by the vendee or broker to be composed of certain persons, when in point of fact it was not, would avoid a contract, if the mistake should operate to the injury or inconvenience of the seller.¹ But where consideration for the person forms no inducement to the contract, the mistake, being merely inconsequential, would not avoid it; and if, purely through mistake of person, any party should be employed to do a particular act or series of acts, and should do them, the party making the mistake must bear the consequences thereof, and cannot throw them upon the innocent party.²

§ 419. Where a mistake occurs as to the nature of the subject-matter of the contract, there is no assent, and of course no contract; as if an unopened cask or barrel be bought upon the supposition, that it contains one thing, when it actually contains another, there is no sale.³ So, where payment of a note is made in counterfeit bank-notes, the person making such payment being innocent, for them the payee may recover of him the amount of such notes, in an action for money had and received;⁴ provided he offer to return them in a reasonable time.⁵ If, however, by the agreement, notes or coins are to be received in payment, it is not regarded as a bargain for cash, but in the nature of barter, and if they prove worthless or

¹ *Mitchell v. Lapage*, Holt, N. P. R. 253.

² *Pothier on Oblig.* p. 1, No. 9.

³ *Conner v. Henderson*, 15 Mass. 319. And see *Rice v. Dwight Manufacturing Co.* 2 Cush. 80.

⁴ *Young v. Adams*, 6 Mass. 182; *Jones v. Ryde*, 5 Taunt. R. 488; *Ellis v. Wild*, 6 Mass. 321; *S. P. Mudd v. Reeves*, 2 Harr. & Johns. 368; *Hargrave v. Dusenberry*, 2 Hawks, 326; *Markle v. Hatfield*, 2 Johns. 456; *Keene v. Thompson*, 4 Gill & Johns. 463.

⁵ *Salem Bank v. Gloucester Bank*, 17 Mass. 1-33; *Bank of U. States v. Bank of Georgia*, 10 Wheat. 333; *Raymond v. Baar*, 13 Serg. & Rawle, 318; *Price v. Neal*, 3 Burr. 1354; *Levy v. Bank of U. States*, 4 Dall. R. 234; s. c. 1 Binn. R. 27.

counterfeit, the loss, in the absence of fraud, must be borne by the receiver.¹ So, where an article was sold as "waste silk," when it was no such thing;² or where a material was bought as "scarlet cuttings," which was not scarlet cuttings;³ or where a stone was sold as a bezoar stone, when it was not;⁴ or where a quantity of dried leather, and bones, and burnt clay, was sold as "a seroon of indigo;"⁵ the sale was held to be void. So, also, if a pair of candlesticks be bought and sold as being silver, both parties believing them to be so, and they turn out to be plated, the contract is at an end.⁶

§ 420. Where there is a mutual mistake, as to a fact forming the basis of the contract, the contract will be void, although no fraud be practised.⁷ Thus, if the subject-matter of the contract, though supposed by both parties to be in existence, be actually destroyed at the time the contract is made, it will be void.⁸ Nor does it make any difference in the rule, that the subject-matter is known to both parties to be liable to accidents and contingencies, by which it may be destroyed at any moment. Thus, if a person should sell a house, which at the moment of the sale had been destroyed by fire or otherwise, though he was ignorant of the fact, the basis of their contract being gone, the contract would be void.⁹ So, also, if a horse be sold, which both parties believe to be alive at the

¹ *Ellis v. Wild*, 6 Mass. 321; *Alexander v. Owen*, 1 T. R. 225; 3 Starkie on Evid. 1089. Post, § 978 to § 981.

² *Gardiner v. Gray*, 4 Camp. R. 144; *Meyer v. Everth*, 4 Camp. R. 22.

³ *Bridge v. Wain*, 1 Stark. N. P. C. 504; *Shepherd v. Kain*, 5 Barn. & Ald. 240.

⁴ *Chadelor v. Lopus*, Cro. Jac. 4.

⁵ *Williams v. Spafford*, 8 Pick. R. 250.

⁶ *Pothier on Oblig. P. 1, ch. 1, n. 18.* See also post, Implied Warranty, § 831.

⁷ *Miles v. Stevens*, 3 Barr, R. 21.

⁸ *Hitchcock v. Giddins*, 4 Price, R. 135.

⁹ *Allen v. Hammond*, 11 Peters, 63; *Hitchcock v. Giddins*, 4 Price, R. 135; s. c. *Daniel's Exch. R. 1*; 1 Story's Comm. Eq. Jurisp. § 143; 2 Kent, Comm. Lect. 39, p. 469.

time of the sale, but which is in fact dead, there is no sale.¹ So, also, if an insurance should be made of goods supposed to be on board a particular ship, and the premium should be paid, and the goods should prove not to be on board, the insurer could recover the premium of insurance.² So, also, where bills of exchange were drawn upon a firm in Havre by their agent in New York, and sold on the same day that the drawers failed, but the agent as well as the purchaser was ignorant of such failure at the time of the sale, it was held, that the purchaser was entitled to rescind the contract, on the ground of a mutual mistake of a material fact.³

§ 421. Again, a mistake may arise in respect to the consideration to be paid for a certain act or thing, and the rule in such case is, that if the person, who is to pay the consideration, suppose it to be *smaller* than the other party intends, no contract would be effected;⁴ but if the party who is to pay the consideration, suppose it to be *larger* than it is, a contract would arise for the lesser sum. Thus, if A. agree to buy two certain articles, supposing the price to be ten dollars apiece, and B. agree to sell it, understanding that he is to receive only ten for both, the sale of both would be understood to be for ten dollars.⁵ So, also, where shingles were sold and delivered at \$3.25, but there was a mutual mistake as to whether this sum was to be paid for a bunch or for a thousand, it was held that unless both parties had understandingly assented to one or other of these views, no special contract as to price had been created.⁶

¹ 1 Story, Eq. Jurisp. § 143, 143, a.; *Allen v. Hammond*, 11 Peters, 71. And see *Hastie v. Couturier*, 20 Eng. Law & Eq. R. 533.

² Park on Ins. ch. 19, p. 503, 6th ed. 1809; *Allen v. Hammond*, 2 Sumner, R. 398.

³ *Leger v. Bonnaffe*, 2 Barbour, S. C. R. 475.

⁴ *Greene v. Bateman*, 2 Woodbury & Minot, 362.

⁵ Brown on Sales, § 223; Pothier, *Contrat de Vente*, No. 36.

⁶ *Greene v. Bateman*, 2 Woodbury & Minot, 359.

§ 422. Where money is paid by mistake, under an ignorance or forgetfulness of facts, or under a misapprehension of the state of the contract on which the party pays it, if he be not legally nor morally obliged to pay, it may be recovered back.¹ Nor is it any defence to an action to recover such money, that the other party had the means of knowledge.² But if money be paid in ignorance of a fact, which would have absolved the party paying it in law, but not in morals and conscience, it would seem, that such a mistake ought not to be a sufficient ground to entitle the party paying to reclaim it. Thus, if the statute of limitation should have absolved a party from legal liability to pay a just debt, and in ignorance, or mistake, or forgetfulness, that the time prescribed already had passed, he should pay it, he could not reclaim the money. So, also, if a note should be indorsed in payment of a just debt to the creditor, and he should omit to give proper notice to the indorser, and the indorser should pay the note, forgetting that he had not received notice, such a mistake ought not to entitle him to recover the money paid, unless the omission of the indorser operated as an injury.³

§ 423. If there be fraud, or misrepresentation, or deceit of any kind, by which either party is imposed upon, it vitiates all contracts, whether in law or in equity. The question of fraud depends upon the particular circumstances of each case, and is as difficult to define, as it is easy to perceive. It must be actual, however, and not negative, and such as to influence

¹ Ante, § 103; *Kelly v. Solari*, 9 Mees. & Welsb. 54; *Lucas v. Worswick*, 1 Mood. & Rob. 293; *Pearson v. Lord*, 6 Mass. 84; *Bond v. Hays*, 12 Mass. 36; *Lazell v. Miller*, 15 Mass. 208; *Mowatt v. Wright*, 1 Wend. 355; *Burr v. Veeder*, 3 Wend. 412; *Dickins v. Jones*, 6 Yerg. 483; *Whitcomb v. Williams*, 4 Pick. R. 228; *Goddard v. Merchants Bank*, 2 Sandf. S. C. R. 247; *Merchants Bank v. Macentyre*, 2 Sandf. S. C. R. 431.

² *Ibid.* *Waite v. Leggett*, 8 Cowen, R. 195; *Wheadon v. Olds*, 20 Wend. R. 174; *Kelly v. Solari*, 9 Mees. & Welsb. 54.

³ *Leslie v. Baillie*, 2 Younge & Coll. N. R. 91, 96; *Stevens v. Lynch*, 12 East, R. 38; Post, ch. vii.

positively the mind of the party, upon whom it is practised.¹ This subject will be more fully considered hereafter.

§ 424. In respect, however, to all classes of persons, who are *non compotes mentis*, whether their incapacity arise from insanity, idiocy, temporary drunkenness, aberration of mind, or weakness of understanding, the most entire good faith is required, (*uberrima fides*). And if contracts be made with such persons to their disadvantage, such a circumstance, in itself, will afford a presumption of fraud, and the contract will be declared invalid both in a court of law and in a court of equity.² Where, however, a contract is made with such persons in entire good faith, and it enures to their benefit, as if it be for necessities, it will be good, both at law and in equity.³ So, also, if a purchase be made *bonâ fide*, with a person incapacitated by mental infirmity to contract, and in ignorance of the fact, and no advantage be taken of the party, the purchase will not be set aside in equity, unless the parties can both be reinstated in their former situation.⁴

§ 425. This subject will be considered more fully hereafter, in treating of Illegal and Fraudulent Contracts.

¹ See Post, ch. xviii.

² *Yates v. Boen*, 2 Str. R. 1104; *Baxter v. Earl of Portsmouth*, 5 Barn. & Cres. 170; s. c. 7 Dowl. & Ryl. 618; *Faulder v. Silk*, 3 Camp. R. 126; *Brown v. Joddrell*, 1 Mood. & Malk. 105; s. c. 3 Car. & Payne, 30; *Levy v. Barker*, 1 Mood. & Malk. 106, and note (6).

³ *Baxter v. Earl of Portsmouth*, 5 Barn. & Cres. 170; *Ex parte Hall*, 7 Ves. R. 264.

⁴ *Niell v. Morley*, 9 Ves. R. 478; *Sergeson v. Sealey*, 2 Atk. R. 412; 1 Story, Eq. Jurisp. § 228.

CHAPTER XVII.

THE CONSIDERATION.

§ 426. WE now come to that incident of a simple contract, which distinguishes it from a specialty, and without which it cannot exist, namely, *the consideration*.

§ 427. An agreement, without consideration, is utterly void, and no action can be maintained thereupon; "*Ex nudo pacto non oritur actio*."¹ In the case of a contract under seal, the law always presumes a sufficient consideration, which the parties, except in special cases, are estopped² from deny-

¹ The same rule obtains in the Roman law, and the foreign commercial law. Pothier on Oblig. 24, p. 42; Story on Bills, § 180, p. 200; Chitty on Cont. 27; Doc. & Stu. 2, c. 24; Rann v. Hughes, 7 T. R. 350; Middleton v. Lord Kenyon, 2 Ves. Jr. 391; Sharlington v. Strotton, Plowd. R. 302, 308; Pothier, Pand. Lib. 2, tit. 14, n. 33; Pothier, by Evans, vol. 2, n. 2, p. 19 to 25.

² Cooch v. Goodman, 2 Adolph. & Ell. N. R. 580, 599, where, in delivering the opinion of the court, Lord Denman said: "It should, however, be observed, that a covenant, being under seal, does not by law require any consideration to support it, and though an illegal consideration may be shown and will vitiate it, and, if a consideration be stated on the face of a deed, a different one may be proved in order to raise a legal defence; yet a mere failure of consideration, which once existed, may have no more effect than a total want of consideration in the first instance. Several cases are cited in Com. Dig. tit. Covenant F., to show, that, under circumstances, a failure of consideration will prevent an action of covenant from being maintainable; and we are by no means prepared to deny this proposition. But in the present case, there has

ing;¹ while in the case of a simple contract, (under which term is included all contracts not under seal, whether oral or written,)² a sufficient consideration must not only exist in fact, and be averred in the pleadings, but must also be proved, in order to entitle either party to recover. Nor is the case of a promissory note or a bill of exchange ordinarily an exception to this rule; for, as between the original parties to the bill or note, although the presumption is, that the consideration is sufficient, so that it is unnecessary for the plaintiff to establish a consideration, yet failure or illegality of consideration may be insisted upon by the defendant, as a defence or bar to the action; and the only difference between the case of a bill or note and any other contract, as to the immediate parties, is, that the burden of proof is shifted.³ The doctrine, that the failure or illegality of consideration is no defence or bar to the title of a *bonâ fide* holder of negotiable paper for a valuable consideration, without notice of the defect, must, indeed, be regarded as an exception. It stands upon grounds of public policy and convenience, and is indispensable in order to give to negotiable paper that security and facility of circulation, without which it would be nearly useless to the community.⁴

not been any such failure; and, therefore, we are of opinion, that the case comes within the general rule laid down in Com. Dig. Fait, C. 2, and the cases there cited, namely, — that if one party executes his part of an indenture, it shall be his deed, though the other does not execute his part.”

¹ In some of the States in this country, the want of consideration is by local usage or by statute, rendered a complete defence to a sealed contract. *Swift v. Hawkins*, 1 Dall. 17; *Solomon v. Kimmel*, 5 Binn. 232; *Cage v. Boughton*, 11 Wend. 106; *Leonard v. Bates*, 1 Blackf. 173; *Walker v. Walker*, 13 Iredell, 335; *Coyle v. Fowler*, 3 J. J. Marsh. 473.

² *Cook v. Bradley*, 7 Conn. R. 57; *People v. Shall*, 9 Cowen, R. 778; *Burnet v. Bisco*, 4 Johns. R. 235; *Thatcher v. Dinsmore*, 5 Mass. R. 301.

³ 3 Kent, Comm. 80 to 82; *Jackson v. Warwick*, 7 T. R. 121; Story on Part. § 178, 187, and cases cited, p. 200; Chitty on Bills, ch. 3, § 1, p. 78 to 85, (8th ed.); Id. p. 90 to 92; *Collins v. Martin*, 1 B. & P. 651; *Holliday v. Atkinson*, 5 B. & C. 501.

⁴ Story on Bills, § 187, 188; *Collins v. Martin*, 1 B. & P. 651; *Bramah v. Roberts*, 1 Bing. N. C. 469.

§ 427 *a*. By the Roman law a naked agreement, without a *cause*, gave no right to an action; but where there was a *cause* the agreement became an obligation, and gave birth to a right of action. “*Quum nulla subest causa praeter conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit.*”¹ By the common law the *cause* is carefully discriminated from the *motive*; a good motive not being sufficient to support a contract. The *causa* of the Roman law is equivalent to the *consideration* of the common law; and by the latter term is to be understood some cause which has a value susceptible of legal appreciation, and not merely a moral motive.² Yet, although the least consideration that is appreciable in value will be sufficient to support a contract, it must appear not to be utterly valueless. For if the contract be founded upon a consideration mistakenly supposed to be of value, yet if it turn out afterwards to be utterly worthless the contract cannot be enforced.³

¹ Digest, Lib. 2, tit. 14, sect. 7, § 3. Plowden, in a note to the case of *Sharlington v. Strotton*, (Plowd. R. 309,) thus states the rule: “*Nudum Pactum est ubi nulla subest causa praeter conventionem; sed ubi subest causa, fit obligatio et parit actionem.*” The word “*propter*,” instead of “*praeter*,” occurs in some editions of the Roman Digest. See also Wood’s Civil Law, ch. 1, p. 205, and note. Viner’s Abr. *Nudum Pactum*, A. pl. 1. In the Civil Code of France, the rule is thus laid down: “*L’obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.*” Code Civil, Liv. 3, tit. 3, ch. 2, sect. 4, § 1131.

² In *Thomas v. Thomas*, 2 Q. B. R. 859, Mr. Justice Patteson, commenting on the term “*causa*,” says: “It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something that is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration.” See also *Sharlington v. Strotton*, Plowd. R. 309, and note; *Mouton v. Noble*, 1 Louisiana Ann. R. 192; *Jennings v. Brown*, 9 Mees. & Welsb. R. 501.

³ *Cabot v. Haskins*, 3 Pick. R. 83. See post, § 437, § 453, § 465, § 480.

§ 428. But although a consideration is absolutely essential, in order to support a parol contract, yet it is not necessary that it should be expressed in writing, even although the contract itself be written, provided it be proved, in point of fact.¹ But if the consideration be stated in the written contract, it is to be taken as the actual consideration, unless the contract import others not expressed therein; as if the words "for other considerations," be used.² The statement of the consideration in a parol contract does not, however, operate by way of estoppel, so as to prevent the parties from showing additional considerations, in like manner as in cases of specialties.³ And if a written contract do not set forth the specific consideration, but state in general terms, that it is founded on a valuable consideration, such a statement will be considered as *prima facie* evidence of the fact.⁴

§ 429. The law requires not only a consideration, but that it should be valuable. A valuable consideration is distinguished from a good consideration. A good consideration is an equitable consideration, founded upon mere love, or affection, or gratitude, which, although it will support the contract as between the parties, when executed, will not support an action to enforce an executory contract; but a valuable con-

Warder v. Tucker, 7 Mass. R. 449; Freeman v. Boynton, 7 Mass. R. 483; White v. Bluett, 24 Eng. Law & Eq. R. 434; Sykes v. Dixon, 9 Adolph. & Ell. 693; James v. Williams, 5 Barn. & Adolph. 1109.

¹ Arms v. Ashley, 4 Pick. R. 71; Tingley v. Cutter, 7 Conn. R. 291; Patchin v. Swift, 21 Verm. 292; Thompson v. Blanchard, 3 Comst. 335; Cummings v. Dennett, 26 Maine R. 397.

² Leonard v. Vredenburgh, 8 Johns. R. 29; Maigley v. Hauer, 7 Johns. R. 341; Elliott v. Giese, 7 Harr. & Johns. 457.

³ Peacock v. Monk, 1 Ves. R. 128; Schermerhorn v. Vanderheyden, 1 Johns. 139; Emery v. Chase, 5 Greenl. R. 232; Clarkson v. Hanway, 2 P. Wms. R. 204. But see The King v. The Inhab. of Scammonden, 3 T. R. 474. Post, ch. 8. Cutter v. Reynolds, 8 B. Monroe, 596; Emmons v. Littlefield, 13 Maine R. 233.

⁴ Whitney v. Stearns, 16 Maine R. 394; Sloane v. Gibson, 4 Missouri, R. 33.

sideration is a legal consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other party.¹

§ 430. The subject naturally divides itself into, 1st. Valuable Considerations; 2d. Insufficient Considerations. Valuable considerations are of various kinds, and for the sake of distinctness and facility of reference, we propose to divide them into the following classes:² 1st. Benefit and Injury; 2d. Forbearance; 3d. Assignment of a Chose in Action; 4th. Mutual Promises; 5th. Consideration moving from Third Persons.

¹ 2 Black. Comm. 297; Story on Prom. § 183; Comm. Dig. Action on Case, Assumpsit, B. 1, 2, 4, 5, 9, 10; Violett v. Patton, 5 Cranch, R. 142.

² "Valuable considerations," says Sir William Blackstone, "are divided by the civilians into four species: 1. *Do, ut des*; as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*; as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A. will not trade to Lisbon, B. will not trade to Marseilles, so as to avoid interfering with each other. 3. The third species of consideration is, *facio, ut des*; when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias*; which is the direct counterpart of the preceding; as when I agree with a servant to give him such wages upon his performing such work; which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det*, and *herus dat, ut servus faciat*."

BENEFIT OR INJURY.

§ 431. In the first place, as to consideration arising from *Benefit or Injury*. The principal requisite, and that which is the essence of every consideration, is, that it should create some benefit to the party promising, or some trouble, prejudice, or inconvenience to the party to whom the promise is made; wherever, therefore, any injury to the one party, or any benefit to the other party springs from a consideration, it is sufficient to support a contract.¹ But in order to render an injury to the promisee a good consideration, it must be an injury upon entering into the contract, and not from a breach of it.² It is not necessary that the consideration and promise should be equivalents in actual value, for it would be impossible ever precisely to determine whether in a given case the consideration was adequate, without a psychological investigation into the motives of the parties. Besides, if no contract were good but those which were apparently of equal benefit to both parties, probably very few contracts which are made would be legally valid. Each party to a contract may ordinarily exercise his own discretion, as to the adequacy of the consideration; and if the agreement be made *bonâ fide*, it matters not how insignificant the benefit may apparently be to the promisor, or how slight the inconvenience or damage appear to be to the promisee; provided it be susceptible of any legal estimation.³

¹ Comyn's Dig. Action on the Case, Assumpsit, B. 1; Forth v. Stanton, 1 Saund. 211, note 1, 2; Miller v. Drake, 1 Caines, 45; Powell v. Brown, 3 Johns. 100; Forster v. Fuller, 6 Mass. 58; Overstreet v. Phillips, 1 Litt. 123; Lent v. Padelford, 10 Mass. 230; Train v. Gold, 5 Pick. 380; Metcalf's Digest, Agreement, and cases cited; Williamson v. Clements, 1 Taunt. R. 523; Gully v. The Bishop of Exeter, 10 Barn. & Cres. 606; Violet v. Patton, 5 Cranch, R. 142; Kirwan v. Kirwan, 2 Cr. & M. 623; Hubbard v. Coolidge, 1 Metcalf, R. 93.

² Lord Campbell, C. J., in Gerhard v. Bates, 20 Eng. Law & Eq. R. 135.

³ Comyn's Dig. Action upon the Case, Assumpsit, B; Davis v. Morgan, 4 Barn. & Cres. 8. See post, § 190; Pierce v. Fuller, 8 Mass. R. 223; Bragg

Thus, a promise to pay the bond of a third person, if the obligee will go before a magistrate, and make oath that it was rightly read to the obligor before he executed it, is binding, because "the travail of coming before the mayor is a very good consideration."¹ So, also, proof of a debt is a sufficient consideration for a promise to pay, because it is a charge to the plaintiff.² And a promise to pay a certain sum of money, on condition that the plaintiff call for it at a particular time, is binding; because the condition is an inconvenience to the plaintiff.³ So, also, a promise in consideration of receiving a certain sum of money, to pay the same into court, is good; because the party receiving the money had the benefit of it.⁴ So, also, where, in order to facilitate the making of an agreement, for which there was sufficient consideration between A. and C., B., who received no benefit himself, became a party thereto, it was held, in an action against B., that, as the agreement was such as A. would not have made, unless B. had consented to be a party, there was a sufficient consideration for B. to promise.⁵ Again, where the defendant promised to the plaintiff to pay him £1,000, if the latter would surrender to him a letter, written by O., then deceased, by means of which the defendant was enabled to determine certain controversies, and obtain a large portion of O.'s effects, it was held

c. Tanner, cited Cro. Jac. 397; *Lawrence v. McCalmont*, 2 Howard, R. 426; *Hubbard v. Coolidge*, 1 Metcalf, R. 84; *Clark v. Sigourney*, 17 Conn. R. 511; *Sanborn v. French*, 2 Foster, 246; *Whittle v. Skinner*, 23 Verm. 532; *Bainbridge v. Firmstone*, 8 Adolph. & Ell. 743. In *Train v. Gold*, 5 Pick. R. 384, Mr. Justice Wilde said: "If a contract is deliberately made without fraud, and with a full knowledge of all the circumstances, the least consideration will be sufficient." *Raikes v. Todd*, 35 Eng. Law & Eq. R.

¹ *Knight v. Rushworth*, Cro. Eliz. 169; *Brooks v. Ball*, 18 Johns. 337; *Perkins v. Binke*, 2 Sid. 123.

² *Travers v. —*, 1 Sid. 57; *Brett v. Pretymen*, 1 Sid. 283; *Loo v. Burdeux*, 1 Sid. 369; *Sir George Tooke's case*, 7 Mod. 13.

³ *Train v. Gold*, 5 Pick. 384.

⁴ *Anon.* 2 Vent. 45; *Com. Dig.* Action upon the Case, Assumpsit, B. 10.

⁵ *Baily v. Croft*, 4 Taunt. R. 611. See also *Bainbridge v. Firmstone*, 8 Adolph. & Ell. 743.

that there was sufficient consideration to support the promise.¹ So, also, an agreement by a creditor to take less than the face of his demand, upon receiving security for the amount to be paid, is founded on a sufficient consideration, growing out of the additional security.²

§ 431 *a*. But where the consideration is manifestly worthless, it would not support the contract. Thus, a promise by a father to discharge his son from a note he held against him, in consideration that the son would make no more complaint of the distribution of his father's property, has been held to be without consideration, and void.³ So, a contract whereby the defendant agreed "to remain with Mrs. A.

¹ *Wilkinson v. Oliveira*, 1 Bing. N. C. 490. See *Orme v. Galloway*, 24 Eng. Law & Eq. R. 521.

² *Phillips v. Burger*, 2 Barbour, S. C. R. 608.

³ *White v. Blunett*, 24 Eng. Law & Eq. R. 434, Pollock, C. B., said: "The plea is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and following the words only, the conclusion may be arrived at. It is said, the son had a right to an equal distribution of his father's property, and did complain to his father because he had not an equal share, and said to him, I will cease to complain if you will not sue upon this note. Whereupon the father said, if you will promise me not to complain I will give up the note. If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that other might say, do not complain, and I will give you five pounds. It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, now, if you will not make any more complaints, I will not sue you, such a promise would be like that now set up. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration." And Baron Alderson added: "If this agreement were good, there could be no such thing as a *nudum pactum*. There is a consideration on one side, and it is said the consideration on the other is the agreement itself; if that were so, there could never be a *nudum pactum*."

for two years from the date hereof, for the purpose of learning the trade of dress maker," was held to be a nude pact, there being no stipulation on Mrs. A.'s part operating as an inducement to such an agreement, so that no action could be maintained against the defendant for leaving her mistress.¹ So, also, where an instrument was signed by the defendant in these terms: "Mr. J——, as you have a claim on my brother for £5 17s. 9d. for boots and shoes, I hereby undertake to pay the amount within six weeks," it was held to be without consideration, and void.²

§ 432. Where the inadequacy of consideration is so gross as to create a presumption of fraud and overreaching, or of unconscientious advantage taken under circumstances of distress or improvidence on the one side, or of mental incompetency on the other, the contract founded thereon cannot be enforced at law or in equity; and a court of equity will, at the instance of the party deceived, interfere and set it aside after it is executed.³ In cases of gross inadequacy, the court will also take advantage of every circumstance which indicates oppression or improper advantage, to found a presumption of fraud, and thereby to rescind the contract.⁴ The mere inadequacy of

¹ *Lees v. Whitcomb*, 2 Moore & Payne, 86; s. c. 5 Bing. R. 34. See also *Sykes v. Dixon*, 9 Adolph. & Ell. 693; *Bates v. Cort*, 3 Dowl. & Ryl. 676.

² *James v. Williams*, 5 Barn. & Adolph. 1109.

³ *Gwynne v. Heaton*, 1 Bro. Ch. R. 5, and cases cited in the note by Mr. Perkins; *Heathcote v. Paignon*, 2 Bro. Ch. R. 167; *Osgood v. Franklin*, 2 Johns. Ch. R. 23; s. c. 14 Johns. R. 527; *George v. Richardson*, Gilmer, R. 230; *White v. Damon*, 7 Ves. R. 30; *Cathcart v. Robinson*, 5 Peters, R. 264; *Coles v. Trecothick*, 9 Ves. R. 234; *McKinney v. Pinckard*, 2 Leigh, 149; *Seymour v. Delancy*, 3 Cowen, 445; *Sarter v. Gordon*, 2 Hill, Ch. R. 126; *Moffat v. Winslow*, 7 Paige, R. 124; *Copis v. Middleton*, 2 Mad. R. 410; *Griffith v. Spratley*, 1 Cox, R. 383; post, § 146; *Follett v. Rose*, 3 McLean, R. 332; *Robinson v. Schly*, 6 Cobb, Georgia R. 515; *Gasque v. Small*, 2 Strob. Eq. 72.

⁴ *Ibid.* *James v. Morgan*, 1 Lev. R. 111; *Hough v. Hunt*, 2 Ham. R. 506; *Williams v. Powell*, 1 Iredell, Eq. R. 460; *Hardeman v. Burge*, 10 Yerger, R. 202; *Butler v. Haskell*, 4 Dess. R. 651; *Udall v. Kenny*, 3 Cowen, R.

the consideration is not, however, in such cases the ground upon which a contract is invalidated, but the *fraud* which is thereby indicated; and, however inadequate the consideration may be, yet if the circumstances of the case indicate no unfair advantage on the one side, or no great incompetency on the other, the contract will be valid.¹

§ 433. Where a benefit is done to a third person, at the request of the promisor, it is sufficient to support his promise. As, for instance, where a person contemporaneously becomes surety for the debts, or for the performance of certain duties, or covenants, of third persons, or assumes any species of collateral obligation, or guaranty, he renders himself liable thereupon. The consideration, which supports this contract, is the favor which the surety receives from a compliance with his express or implied request or desire, that credit should be given to the principal.² Any person may render himself liable as surety to a third person, without the knowledge of the principal; nor is it necessary that there should be any consideration moving directly between the principal and surety;³ for so long as there is some consideration for the promise between the immediate parties, it is binding. But unless the promise be con-

590; *Wormack v. Rogers*, 9 Georgia, R. 60; *Johnson v. Dorsey*, 7 Gill, R. 269; *Edwards v. Burt*, 15 Eng. Law & Eq. R. 435; *Judge v. Wilkins*, 19 Ala. R. 765.

¹ Comyn's Dig. Action on the Case, Assumpsit, (B), and cases cited, *supra*; *Milnes v. Cowley*, 8 Price, R. 620; *Hubbard v. Coolidge*, 1 Metcalf, R. 93; *Stewart v. The State*, 2 Harr. & Gill, 114; *Johnson v. Titus*, 2 Hill, 606.

² *Brown v. Garbrey*, Gouldsb. 94; *Kirby v. Coles*, Cro. Eliz. 137; *Stadt v. Lill*, 9 East, 348; *Leonard v. Vredenburg*, 8 Johns. 29; *Hunt v. Adams*, 5 Mass. 362; *Howe v. Ward*, 4 Greenl. 195.

³ *Minet's case*, 14 Ves. R. 189; *Morley v. Boothby*, 3 Bing. R. 113. In this case, Best, C. J., said: "No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough, if the person for whom the guarantor becomes surety has a benefit, or the person to whom the guaranty is given suffer inconvenience, as an inducement to the surety to become guaranty for the principal debtor."

temporaneous with the original debt, and constitute the inducement thereto, it will not be binding.¹ A guaranty, therefore, of a debt already contracted, or of a contract already made, will not be binding, for want of consideration.² Where there is a promise to pay the preëxisting debt of another person to his creditor, there must be a new consideration to support it, for the original consideration of the principal's contract cannot be so extended as to support the new promise.³

§ 434. It is not, however, absolutely necessary, in order to constitute a sufficient consideration to a promise, that a benefit should accrue to the promisor; for if that promise be made as the inducement to a subsequent engagement by a third person with the promisee, it will be a sufficient consideration. Thus, in the case of a letter of credit given by A. to B., the person who, on the faith of such letter, trusts B., has his remedy against A., although no benefit accrue to A. as the consideration of his promise.⁴ So, also, if one person should promise to subscribe to pay a certain sum, provided a certain third person would pay a particular sum, this promise would be founded on a sufficient consideration, if such third person should, in consequence thereof, subscribe such sum.⁵ So, also,

¹ *Payne v. Wilson*, 7 Barn. & Cres. 423; *D'Wolf v. Rabaud*, 1 Peters, R. 476.

² *Leonard v. Vredenburg*, 8 Johns. R. 29; *D'Wolf v. Rabaud*, 1 Peters, R. 476; *Bailey v. Freem*, 11 Johns. R. 221; *Hunt v. Adams*, 5 Mass. 358; *Flagg v. Upham*, 10 Pick. R. 148; post, 146.

³ *Packard v. Richardson*, 17 Mass. R. 129; *Thacher v. Dinsmore*, 5 Mass. R. 301; 1 Saund. 211, and note; *Bixler v. Ream*, 3 Penn. R. 282; *Parker v. Carter*, 4 Munf. 273.

⁴ *Violett v. Patton*, 5 Cranch, 142, 152; 2 Peters, Cond. 214; *Carnegie v. Morrison*, 2 Metcalf, R. 381; *Maud v. Waterhouse*, 2 Car. & Payne, 579; *Smith v. Algar*, 1 Barn. & Adolph. 603; *Emmett v. Keams*, 7 Scott, R. 687; s. c. 7 Dowl. 630.

⁵ See *George v. Harris*, 4 N. Hamp. R. 533; *Troy v. Perry*, 6 Id. 164; *Troy Academy v. Nelson*, 24 Verm. R. 189.

all subscriptions, which are at first gratuitous promises, and not binding, become binding, whenever the subscriber knows that outlays or engagements are made or liabilities assumed in consequence thereof.¹ So, also, all subscriptions made on condition that certain acts shall be done, are binding, if such acts be done.² And this knowledge would be implied from circumstances, and express notice need not be proved.³

FORBEARANCE.

§ 435. In the next place, as to *Forbearance*. Forbearance for a certain or reasonable time to institute a suit upon a well-founded claim, or even upon one which is doubtful,⁴ is a sufficient consideration to support a promise; since it is a benefit to the one party, and a prejudice to the other.⁵ If the time of forbearance be stated, it must be a reasonable time; and an agreement to forbear *per breve aut paululum tempus*, or *pro aliquo tempore*, will not be sufficient, inasmuch as the party promis-

¹ *Bryant v. Goodnow*, 5 Pick. R. 229; *Trustees of Farmington Acad. v. Allen*, 14 Mass. R. 172; *Homes v. Dana*, 12 Mass. R. 190; post, § 449, § 453; *Robertson v. March*, 3 Scam. 198; *Barnes v. Perine*, 9 Barbour, 202.

² *Williams College v. Danforth*, 12 Pick. R. 541; *Munroe v. Perkins*, 9 Pick. R. 305.

³ *Farmington Acad. v. Allen*, 14 Mass. R. 172; post, § 456.

⁴ *Blake v. Peck*, 11 Verm. R. 483; *Truett v. Chaplin*, 4 Hawks, R. 178; *Zane v. Zane*, 6 Munf. R. 406.

⁵ *Thornton v. Fairlie*, 2 Moor, 397; *Richardson v. Mellish*, 2 Bing. 229; s. c. 9 Moor, 458; *Bidwell v. Catton*, Hob. 216; *Stewart v. M'Guin*, 1 Cow. R. 99; *Richardson v. Brown*, 1 Cow. R. 255; *Rippon v. Norton*, Yelv. 1; *Harris v. Richards*, Cro. Car. 272; *Elting v. Vandelyn*, 4 Johns. 237; *King v. Weeden*, Style, 264; *Barber v. Fox*, 2 Saund. 137, and note; *Forth v. Stanton*, 1 Saund. 211, and note; *May v. Alvares*, Cro. Eliz. 387; Com. Dig. Assumpsit, Action on the Case, B. 1, 2; *Chapin v. Lapham*, 20 Pick. R. 467; *Blake v. Cole*, 22 Pick. R. 97; *Ward v. Fryer*, 19 Wend. R. 494; *Watson v. Randall*, 20 Wend. R. 201. See *Jennison v. Stafford*, 1 Cush. R. 168; *Giles v. Ackles*, 9 Barr, R. 147; *Rood v. Jones*, 1 Dougl. (Mich.) R. 188; *McKinley v. Watkins*, 13 Illinois, R. 140.

ing may, in such case, sue immediately after the promise is made.¹ The mere indefiniteness of the agreement, as to the time of forbearance, will not, however, invalidate it. If, therefore, the agreement be to forbear for a reasonable time, it is sufficient, since the court will decide, when the action is brought, whether the period of time actually allowed is a reasonable time.² So, also, if no agreement be made as to the length of time during which the promisor will forbear, the law will presume that he promises to forbear for a reasonable time; and this is sufficiently certain, since *Id certum est, quod certum reddi potest*.³ Thus, if one promise to pay the debt of another, in consideration that the creditor "will forbear, and give further time for the payment" of the debt, it is a sufficient consideration, though no particular time of forbearance be stipulated; provided the declaration aver, that he did actually forbear from such a day to such a day,⁴ and the actual time be reasonable. It is not, however, necessary, in such a case, that the actual time during which forbearance was exercised should be set forth in the declaration. A general allegation of forbearance will be sufficient, if it be proved that it was for a reasonable time.⁵ A general forbearance to sue is consid-

¹ Comyn's Dig. Action on the Case, Assumpsit, B; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Sidwell v. Evans*, 1 Penn. 385; *Downing v. Funk*, 5 Rawle, 69.

² 1 Roll. Abr. 26, l. 50; *Lonsdale v. Brown*, 4 Wash. C. C. R. 148; *Therne v. Fuller*, Cro. Jac. 397; *Beven v. Cowling*, Poph. 183; *Cowlin v. Cook*, Latch, 151; s. c. Noy, 83; *Anon.* 1 Freem. 66; Com. Dig. Assumpsit, B; *Hakes v. Hotchkiss*, 23 Verm. R. 235.

³ *Cowlin v. Cook*, Latch, 151; s. c. Noy, 83; *Therne v. Fuller*, Cro. Jac. 397; *Beven v. Cowling*, Poph. 183; *Mapes v. Sydney*, Cro. Jac. 683; s. c. Hut. 46; *Hamaker v. Eberly*, 2 Binn. 506; *Maynell v. Mackallye*, Style, 459; *Barnehurst v. Cabbot*, Hardr. 5; *Clarke v. Russell*, 3 Watts, 213.

⁴ *King v. Upton*, 4 Greenl. 387; *Elting v. Vanderlyn*, 4 Johns. 237; *Allen v. Pryor*, 3 A. K. Marsh. 305. See *Morton v. Burn*, 7 Adolph. & Ellis, 19; *Willatts v. Kennedy*, 8 Bing. R. 5.

⁵ *Payne v. Wilson*, 7 Barn. & Cres. 423; *Elting v. Vanderlyn*, 4 Johns. R. 237.

ered as a perpetual forbearance, and therefore a good consideration.¹

§ 435 *a*. Where a contract is made of such a nature as to imply a promise to forbear bringing a suit, it will be equally binding as if the promise were express. If, therefore, a person having a judgment debt take from his debtor a promissory note for the amount payable at a future time certain, the agreement to suspend his remedy for that period is necessarily implied in the transaction, and constitutes a good consideration for the giving of a note.²

§ 436. An agreement to forbear to sue or enforce a claim, which is utterly unfounded, and upon which there is no good cause of action, is void for want of consideration.³ Thus, if one of two joint obligors on a bond be released by the obligee, and the other promise afterwards to pay it, in consideration of forbearance on the part of the obligee, the promise would be void for want of consideration, because the release of one obligor is a release of the other.⁴ So, also, a promise by an heir to pay the bond of his ancestor, in consideration of forbearance to sue him thereupon, is void, unless he be expressly

¹ *Clark v. Russell*, 3 Watts, 213; *Sidwell v. Evans*, 1 Penn. 385; *Hume v. Hinton*, Sty. 304; *Elting v. Vanderlyn*, 4 Johns. R. 237; *Herring v. Dorell*, 8 Dowl. R. 604.

² *Baker v. Walker*, 14 Mees. & Welsb. 468. See Post.

³ *Jones v. Ashburnham*, 4 East, R. 455; *Smith v. Algar*, 1 Barn. & Ald. 604; Com. Dig. Action on the Case, Assumpsit, F, 8; *Gould v. Armstrong*, 2 Hall, 266; *Cabot v. Haskins*, 3 Pick. 83; *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, 7 Mass. 483; *May v. Coffin*, 4 Mass. 347; *Atkinson v. Settree*, Willes, 482; *Randall v. Harvey*, Palm. 394; *Rosyer v. Langdale*, Style, 248; *Nelson v. Serle*, 4 M. & W. 795; *Slack v. Moss*, Dudley (Geo.) R. 161; *Wade v. Simeon*, 2 Com. B. Rep. 548; *N. H. Bank v. Colcord*, 15 N. Hamp. R. 119; *Martin v. Black*, 20 Ala. R. 309; *Lowe v. Weatherley*, 4 Dev. & Batt. 212; *Silvernail v. Cole*, 12 Barbour, R. 685; *Lewellyn v. Lewellyn*, 14 Law Journ. Q. B. 4; *Edwards v. Baugh*, 11 Mees. & Welsb. 641.

⁴ *Herring v. Dorrell*, 8 Dowl. 604; *Hammion v. Roll*, March, 202.

bound in the bond.¹ So, also, forbearance to sue a note, given by a feme covert, without her husband's consent, during her coverture, or a bond as surety given by an infant, is no consideration to support a new promise to pay,² because no liability ever attached to either party. So, also, a promise by an heir, in consideration of forbearance to prosecute a suit in chancery against him, to which he could not be made a party, will not support an action.³ Yet if the defendant would avail himself of the insufficiency of such a consideration, in a suit upon his promise, he must show conclusively that the claim could not have been enforced, either in law or in equity.⁴

§ 437. Again, it must appear that there was some party who could be sued, for otherwise forbearance would be a mere form.⁵ But if it appear that the claim was only doubtful, the consideration would be sufficient.⁶ Thus, where a ship, having on board a pilot, as required by law, ran afoul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damages; and the same vessel was detained until bail was given; and, pending such proceedings, the agent of the owners of the damaging vessel agreed to indemnify the owners of the damaged vessel, and to pay a stipulated sum as damages; it was held, that, there being contradictory decisions as to whether ship-owners were liable for an injury done by their ship, while under the control of a pilot, as required by

¹ *Barber v. Fox*, 2 Saund. 136; s. c. 1 Vent. 159.

² *Loyd v. Lee*, 1 Str. 94; *Goodwin v. Willoughby*, Latch, 142; s. c. Poph. 177; Ante, § 57, § 98, b, § 103.

³ *Tooley v. Windham*, Cro. Eliz. 206.

⁴ *Gould v. Armstrong*, 2 Hall, 266.

⁵ *Jones v. Ashburnham*, 4 East, R. 455; *Nelson v. Serle*, 4 M. & W. 795.

⁶ *Richardson v. Mellish*, 2 Bing. 229; s. c. 9 Moor, 435; *Longridge v. Dorville*, 5 B. & Ald. 117; *Wilbur v. Crane*, 13 Pick. 284; *Union Bank of Georgetown v. Geary*, 5 Peters, 114.

law, there was a sufficient consideration to support the promise.¹

§ 438. If, however, the claim be wellgrounded, forbearance to sue it is a sufficient consideration to support the promise of a third person, as well as that of the party liable to suit, if the bringing of the suit would occasion any inconvenience or injury to such third person.² An agreement by the holder of a promissory note, to forbear to sue the maker for a certain and reasonable time, is a sufficient consideration for a guaranty of payment by a third person.³ So, also, a forbearance by A. at the request of B. to enforce a *feri facias*, against the goods of a third person, for £60, was held to be a good consideration for B.'s promise to pay A. £107 in seven days.⁴ So, where forbearance is given by the assignee of a debt, who could not have sued in his own name, the consideration is sufficient.⁵ So, also, a promise, to pay the debt of another if the creditor would stay an execution therefor for a certain time, is a sufficient consideration, if the execution be stayed until after the agreed day.⁶ So also, if an executor or administrator, in consideration of a forbearance by a creditor of the testator to sue, promise to pay his debt, he will be personally bound, although he have no assets,⁷ upon the ground,

¹ Longridge v. Dorville, 5 Barn. & Ald. 117. See Wade v. Simeon, 2 Com. B. Rep. 548.

² Reynolds v. Prosser, Hardr. 71; Davison v. Manslop, T. Ray, 211; Quick v. Coppleston, 1 Sid. 242.

³ Sage v. Wilcox, 6 Conn. 81.

⁴ Smith v. Algar, 1 Barn. & Adolph. 603.

⁵ By the older decisions, the consideration was not sufficient in such cases, unless the assignee had a letter of attorney to sue and release. 1 Rol. Abr. 20, pl. 11, 12, and cases there cited.

⁶ Goring v. Ackles, 9 Barr, R. 147. See, also, McKelvy v. Wilson, 9 Barr, R. 183.

⁷ Goring v. Goring, Yelv. 11, Am. Ed. by Metcalf, note 2; 1 Saund. 210, note (1); Treford v. Holmes, Hut. 108; Parker's case, Hut. 52; Porter v. Bille, 1 Freem. 125; 2 Saund. 137, note c.

that such forbearance is a matter of personal benefit. But if no advantage or benefit accrue to the administrator in his individual capacity, his promise will not render him liable beyond his assets; for a promise is only coextensive with the consideration, unless some particular consideration of fact warrant its extension, so as to create an individual liability.¹ The benefit accruing personally to the administrator arises from the fact, that the creditor may bring a suit against him immediately; and if there be no present assets, he may have judgment to recover *quando bona acciderint*.²

§ 439. It is not, however, necessary, that the forbearance should be in respect of a present and immediate right of action; but it will be sufficient, if the promise be to forbear to prosecute a claim, when it shall become due. Thus, an agreement by a surety to forbear to institute a suit against the principal, whenever his cause of action shall arise, is a sufficient consideration for a promise of indemnity by a third person, although the security have no cause of action at the time of the agreement.³

§ 440. Wherever forbearance to sue either operates as a benefit to the one party, or as an injury to the other, it will be sufficient to support a promise made thereupon. As, for instance, a promise by a judgment debtor to pay the debt and

¹ Bacon, Abr. Executors & Admr's, M. 2; *Rann v. Hughes*, 7 T. R. 350, note.

² Am. Jur. vol. 21, p. 272, No. 42. It has been said, that the executor's promise implies assets; but this would be no reason, since a failure of assets would then be a failure of consideration and invalidate the promise, which it does not. See *Pearson v. Henry*, 5 Term R. 8; *Rann v. Hughes*, 7 Term R. note, 350; *Browne's case*, 1 Freem. 409; *Reech v. Kennegal*, 1 Ves. 126, by Lord Hardwicke. See ante, Executors and Administrators.

³ *Hamaker v. Eberly*, 2 Binn. 506; *Bidwell v. Catton*, Hob. R. 216; *Parker v. Leigh*, 2 Stark. R. 229.

costs, in consideration of a stay of execution, is binding, and will support an action.¹ So, also, if an obligor, on being called upon to pay his bond, should promise to pay on a future day, *assumpsit* would lie on this promise.² Forbearance to levy an execution,³ or to protest a bill of exchange drawn on the party promising,⁴ or the withdrawing of objections to the probate of a will,⁵ are sufficient considerations, upon the same ground. So, also, all compromises of doubtful claims, or conflicting rights, and all arrangements made for the purpose of preventing litigation, constitute a sufficient consideration to support a promise, if made *bonâ fide*, although they may be founded upon a mistake.⁶

§ 441. It is not only not necessary, however, that forbearance should be unlimited, so as to operate as a total discharge of liability; but it is immaterial, whether suit be already commenced or not, or whether the proceedings be at law or in

¹ The contrary doctrine was held by Lord Mansfield and Ashurst, J., in an anonymous case in Cowp. 128, upon the ground that it was turning a judgment debt into a debt upon simple contract; but this seems only to be a matter between the parties, and was differently adjudged in *Tisdale's case*, Cro. Eliz. 758; and in the case of *Tanner v. Hague*, 7 Term R. 420. The rule, as stated in the text, seems the better-founded doctrine. See *Baker v. Walker*, 14 Mees. & Welsb. 468.

² *Foster v. Alanson*, 2 Term R. 479; *Ashbrook v. Snipe*, Cro. Eliz. 240. See, however, *Codman v. Jenkins*, 14 Mass. R. 99, in which this doctrine is denied; but the cases before cited sufficiently establish the rule, as stated in the text.

³ *Boyle v. Scarborough*, Style, 395, 440; Cro. Eliz. 848, 868, 909; Godb. 159, pl. 220; *Best v. Jolly*, 1 Sid. 38; *Love's case*, 1 Salk. 28; *Lent v. Padel-ford*, 10 Mass. R. 230; *Jennings v. Hatley*, Yelv. 20; *Newsom's case*, Clayt. 139.

⁴ *Pinchard v. Fowke*, Style, 416.

⁵ *Hill v. Buckminster*, 5 Pick. 393.

⁶ *Barlow v. Ocean Ins. Co.* 4 Metcalf, 270; *Pickering v. Pickering*, 2 Beav. R. 31; *Leonard v. Leonard*, 2 Ball & Beat. 179, 180; *Shotwell v. Murray*, 1 Johns. Ch. R. 516; *Lyon v. Richmond*, 2 Johns. Ch. R. 51; 1 Story, Equity Jurisprudence, § 131; *O'Keson v. Barclay*, 2 Penn. R. 531. See post, § 449 a.

equity.¹ The only question is, whether forbearance is either a benefit to the one party, or an injury to the other.

§ 442. In cases where forbearance to sue is the consideration of a promise, the declaration should state distinctly to whom the forbearance was given; so that it may appear, whether it were an injury or benefit to either party. For unless the party to whom it is given were actually liable in the suit, or at least, unless his liability were doubtful, the forbearance would constitute no sufficient consideration.²

ASSIGNMENT OF A CHOSE IN ACTION.

§ 443. The assignment of a chose in action is a sufficient consideration for a promise by the assignee, unless it be void for illegality or other sufficient reason.³ An assignment of a chose in action will not, at the common law, however, confer upon the assignee a right of action in his own name against the original debtor, unless such debtor either expressly promise to pay the assignee, or unless the assignment be made with his assent, in which case the law implies a promise from him to the assignee, the consideration of which is the discharge of liability to the assignor in respect of the claim.⁴

¹ *Hamaker v. Eberly*, 2 Binn. 506.

² *Jones v. Ashburnham*, 4 East, R. 455; *Marshall v. Birkenshaw*, 1 Bos. & Pul. N. R. 172.

³ See *Graham v. Gracie*, 13 Q. B. R. 548; *Whittle v. Skinner*, 23 Verm. 532; *Edson v. Fuller*, 2 Foster, 185; *Harrison v. Knight*, 7 Texas, 47; *Sherman v. Barnard*, 19 Barb. 301. For a full consideration of this subject, see ante, ch. 14.

⁴ *Tiernan v. Jackson*, 5 Peters, R. 597; *Crowfoot v. Gurney*, 9 Bing. R. 372; *Hodgson v. Anderson*, 3 Barn. & Cres. 842; *Baron v. Husband*, 4 Barn. & Adolph. 611; 2 Story, Eq. Jur. § 1039. See ante, ch. 14, ch. 15; *Price v. Seaman*, 4 Barn. & Cres. 525; *Edson v. Fuller*, 2 Foster, R. 185; *Graham v. Gracie*, 13 Q. B. 548; *Whittle v. Skinner*, 23 Verm. R. 532.

§ 444. There are, however, certain exceptions to this rule, which obtain at law in favor of negotiable instruments, and which are created by the policy of the law, to answer the demands of public convenience. Wherever, therefore, the contract is negotiable, if it be payable to order, it may be assigned by mere indorsement, and if it be payable to bearer, a mere delivery constitutes a sufficient assignment.¹ In equity, however, this distinction between negotiable instruments, and instruments not negotiable, is wholly disregarded. Every *bonâ fide* assignment for a valuable consideration is considered as a declaration of trust, and confers upon the assignee the same rights of action against the original debtor as the assignor himself would have.²

§ 444 *a*. Again, not only possibilities, expectancies, and contingent rights may be assigned in equity, but may be made the subject of a contract which could be enforced upon the happening of the event on which the contingency is founded, and not before.³ Courts of law, however, now follow the doctrine of equity, as far as possible, without infringing upon established principles of common law; and the beneficial interest of the assignee is so far protected, that the defendant may set

¹ *Fenner v. Meares*, 2 W. Bl. 1269; *Israel v. Douglass*, 1 H. B. 239; *Mowry v. Todd*, 12 Mass. 283; *Jones v. Witter*, 13 Mass. 307; *Crocker v. Whitney*, 10 Mass. 319; *Coolidge v. Ruggles*, 15 Mass. 388; *Lampet's case*, 10 Co. R. 48 a; *Thalhimer v. Brinckerhoff*, 3 Cowen, R. 623; *Comm. Dig. Assignment, D.*; *Tiernan v. Jackson*, 5 Peters, R. 597; *Williams v. Everett*, 14 East, 582; *Crowfoot v. Gurney*, 9 Bing. 372; *Hodgson v. Anderson*, 3 Barn. & Cres. 842; *Baron v. Husband*, 4 Barn. & Adolph. 611; *Mandeville v. Welch*, 5 Wheat. R. 277.

² *Story, Eq. Jurisp.* § 1040, 1055; *Langton v. Horton, Hare*, 549; *Trull v. Eastman*, 3 Metcalf, 121; *Goring v. Bickerstaff*, 1 Ch. Cas. 8; 1 Madd. Ch. Prac. 437; 1 Fonbl. Eq. B. 1, ch. 4, § 2, and note *g*; *Comm. Dig. Chancery, 2 H. Assignment*; *Duke of Chandos v. Talbot*, 2 P. Wms. 603; *Story on Bills of Ex.* § 199, 201.

³ *Story, Eq. Jurisp.* § 1040, 1040 b; *Stokes v. Holden*, 1 Keen, R. 145; *Wells v. Foster*, 8 Mees. & Welsb. 149.

off a debt due to the assignee in like manner, as if the suit had been brought in his name.¹

§ 445. Whenever assignments are illegal or against public policy, they will not be sustained either in equity or law; and, therefore, will constitute no consideration for a promise.² Thus, the assignment of his pay by an officer in the army or navy;³ or an assignment, which savors of maintenance;⁴ or the assignment of a right of action for a tort;⁵ will not support a contract.

§ 446. Where a chose in action is assigned to the government, no express promise is necessary from the original debtor, and the government may sue in its own name.⁶ But where the assignment is of a claim, barred by the statute of limitations, it acquires no new validity thereby.⁷

MUTUAL PROMISES.

§ 447. Mutual promises are concurrent considerations, and will support each other, unless one or the other be void;⁸ in which case, there being no consideration on the one side, no contract can arise. But if the promise on one side be only voidable, as in consideration of money given, or of a promise by an infant, it is sufficient.⁹

¹ *Corser v. Craig*, 1 Wash. C. C. R. 424.

² See ante, ch. 14, § 376.

³ *Flarty v. Odlum*, 3 T. R. 681; *Wells v. Foster*, 8 Mees. & Welsb. 149; *Davis v. Duke of Marlborough*, 1 Swanst. R. 79; *Stone v. Lidderdale*, 2 Anst. R. 533; *Story*, Eq. Jur. § 1040 *d* to 1040 *f*.

⁴ *Prosser v. Edmonds*, 1 Younge & Coll. 481, 496. See post, § 578, § 579.

⁵ *Gardner v. Adams*, 12 Wend. R. 297; *Commonwealth v. Fuqua*, 3 Litt. R. 41.

⁶ *Bac. Abr. Prerogative*, 2, 3; *Cro. Jac.* 180.

⁷ *United States v. Buford*, 3 Peters, 13.

⁸ *Babcock v. Wilson*, 5 Shepley, 372.

⁹ *Comyn, Dig. Action on the Case, Assumpsit*, B. 14; *Doct. & Student*, 181;

§ 448. Mutual promises, however, to be obligatory, must be made simultaneously. If they be made at different times on the same day, they will not be a good consideration for each other, because of the want of reciprocity of obligation, at the moment the contract is made.¹ It is not, however, necessary that each promise should be absolute, so that either party could enforce it against the other;—for a promise conditional on the doing of some act, may be rendered binding by the act, while it may give no right to compel the doing of it. Thus, if a guaranty be given on condition of the employment of a particular person, the guarantor could not insist that such person should be employed, although, if he should be employed, the guaranty would be binding.² Yet, until the conditional

Lampleigh v. Brathwait, Hob. R. 105; s. c. *Smith's Select Cases*, 67; *Parish v. Stone*, 14 Pick. R. 198.

¹ *Nichols v. Raynbred*, Hob. 88 b; 1 Chitty, Pl. 297; 2 Kent, Comm. 465; *Livingston v. Rogers*, 1 Caines, 585; *Tucker v. Woods*, 12 Johns. 190; *Keep v. Goodrich*, 12 Johns. 397. See *Lester v. Jewett*, 12 Barb. R. 502; *McKinley v. Watkins*, 13 Ill. 140; *Dorsey v. Packwood*, 12 How. R. 126; *Governor v. Fox*, 3 Eng. Law & Eq. R. 420, and Bennett's note; *Commercial Bank v. Nolan*, 7 Howard (Miss.), 508; *L'Amoureux v. Gould*, 3 Selden, R. 349.

² *Kennaway v. Treleavan*, 5 Mees. & Welsb. 501. In this case Baron Parke said: "There is a case in the books, of *Newbury v. Armstrong*, which strongly resembles the present. There the guarantee was in these terms: 'I agree to be security to you for T. C. for whatever, while in your employ, you may trust him with, and in case of default, to make the same good;' and the contract was held to be good, on the ground that the future employment of the party was a sufficient consideration. It is said, and truly, that in the present case there was no binding contract on the plaintiffs, and that, notwithstanding the guarantee, they were not bound to employ Paddon. But a great number of the cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed, rests with one of the contracting parties. A guarantee falls under that class; when a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you;' the party indemnified is not, therefore, bound to employ the person designated by the guarantee; but if he do employ him, then the guarantee attaches and becomes binding on the party who gave it. It is, therefore, no objection in the present case to say that the plaintiffs were not obliged to take

promise be rendered binding by the act or time on which it is conditioned, it may be retracted;¹ unless, perhaps, when the retraction operates as an injury to the other party,—as by inducing him to make engagements or assume responsibilities.²

§ 449. Reciprocal promises of marriage are binding; and the promise of an infant to marry is a sufficient consideration for a corresponding promise.³ So, also, a promise to accept and pay for goods, is a sufficient consideration for a promise to sell and deliver them.⁴ And, indeed, the promise by one party to do an act, which is not void, constitutes a sufficient consideration for a promise by the other party.⁵ Nor is it necessary in such cases that an express agreement should be proved, but it may be inferred from such circumstances as usually accompany a similar engagement.⁶ So, also, where several persons mutually agree to contribute certain sums of money toward a common object, which they desire to accomplish, the promise of all is a sufficient consideration for the

Paddon into their service; they might do so or not, as they pleased; but having once done so, the guarantee attaches, and the defendant becomes responsible for the default.” See also *Mozley v. Tinkler*, 1 Crompt. Mees. & Roscoe, 692. And ante, § 26 to § 33. *Morton v. Burn*, 7 Adolph. & Ell. 19; s. c. 34 Eng. Com. Law, R. 18; 2 Williams, Saunders, 186 i; *Laythoarp v. Bryant*, 2 Bing. N. C. 735.

¹ *Routledge v. Grant*, 4 Bing. R. 660.

² See ante, § 381, § 382, and cases cited. *White v. Demilt*, 2 Hall, R. 405; *Babcock v. Wilson*, 17 Maine R. 372; *Appleton v. Chase*, 19 Maine R. 74.

³ *Willard v. Stone*, 7 Cow. 22; *Wightman v. Coates*, 15 Mass. 1; *Boynnton v. Kellogg*, 3 Mass. 189; *Holcroft v. Dickenson*, Carter, 233; s. c. 1 Free. 95, 347; *Harrison v. Cage*, 5 Mod. 412; s. c. 12 Mod. 214; *Baker v. Smith*, Style, 295, 304.

⁴ *Appleton v. Chase*, 19 Maine R. 74; *Bettisworth v. Campion*, Yelv. 134; *Nichols v. Raynbred*, Hob. 88 b, and note by Williams; 8 Johns. 304; *White v. Demilt*, 2 Hall, R. 405.

⁵ *Quarles v. George*, 23 Pick. R. 401; *Myers v. Morse*, 15 Johns. R. 425; *Babcock v. Wilson*, 17 Maine R. 372; *Briggs v. Tillotson*, 8 Johns. R. 304; *Howe v. O'Mally*, 1 Murph. R. 287.

⁶ *Wightman v. Coates*, 15 Mass. R. 1; *Southard v. Rexford*, 6 Cowen, R. 254.

promise of each,¹ at least if the non-performance by one would occasion any prejudice to the others; or if, in consequence of such promises, liabilities be incurred within his knowledge.²

§ 449 *a*. In the next place all mutual compromises and arrangements, by which doubtful legal rights are waived or debts are settled, are valid as being on sufficient consideration, if entered into without fraud.³ But as we have already seen, the waiver of a legal right which has no actual existence, or could not be enforced for want of any responsible party, would not be a sufficient consideration.⁴ So, if the compromise be against public policy, as if it be to waive a suit which the public interest demands should be prosecuted, it would not be binding.⁵ But where there is an honest difference of opinion between different parties as to doubtful rights, and a *bonâ fide* compromise is made, it will be supported both in law and in equity, whether the consideration be equal or not on both sides.⁶ And where the compromise has been founded upon a mistake in point of law, but with full cognizance of all the facts, it will afford no ground of relief, in equity,⁷ unless there

¹ Society in *Troy v. Perry*, 6 N. Hamp. R. 164; *George v. Harris*, 4 N. Hamp. R. 533; *Commissioners v. Perry*, 5 Ham. R. 58; *State Treasurer v. Cross*, 9 Verm. R. 289.

² Ante, § 434. *Bryant v. Goodnow*, 5 Pick. R. 229; *Trustees of Farmington Acad. v. Allen*, 14 Mass. R. 172; *Homes v. Dana*, 12 Mass. R. 190; *Williams v. Danforth*, 12 Pick. R. 541; Post, § 453.

³ *Penn v. Lord Baltimore*, 1 Ves. Sen. 450; *Union Bank v. Geary*, 5 Peters, R. 114; *Barlow v. Ocean Ins. Co.* 4 Metcalf, R. 270; *McKinley v. Watkins*, 13 Illinois R. 140; *Longridge v. Dorville*, 5 Barn. & Ald. R. 117.

⁴ Ante, § 435 to § 442; *Wade v. Simeon*, 2 Man. Grang. & Scott, 548; *Newell v. Fisher*, 11 Sm. & Mar. 431.

⁵ *Coppock v. Bower*, 4 Mees. & Welsb. 361; *Gardner v. Maxey*, 9 B. Monroe, R. 90; *Clark v. Ricker*, 14 N. Hamp. R. 44; *Walbridge v. Arnold*, 21 Conn. R. 424.

⁶ *Longridge v. Dorville*, 5 Barn. & Ald. 117; *Gould v. Armstrong*, 2 Hall, R. 266; *Edwards v. Baugh*, 11 Mees. & Welsb. 641.

⁷ *Storrs v. Barker*, 6 Johns. Ch. R. 169, 170; *Leonard v. Leonard*, 2 Ball & Beat. 179; *Shotwell v. Murray*, 1 Johns. Ch. R. 516; *Lyon v. Richmond*, 2

were imposition or breach of trust between parties standing in confidential relations, or fraudulent advantage taken by one over the other.¹ So, also, all family compromises are upheld in equity; but in all such cases there must be strict honesty.² So, also, the acceptance of a part of the sum due on a debt is a good consideration for a release of the whole claim, provided any change be made in the mode of payment, beneficial to the creditor, — as if the part-payment be in a more convenient place, or at a day before the whole debt is due.³ Where there are mutual accounts and claims between persons, any *bonâ fide* settlement between them to liquidate the account would be upheld.⁴

CONSIDERATION MOVING FROM THIRD PERSONS.

§ 450. It is now well settled as a general rule, although the early cases are quite contradictory on the point, that in cases of simple contract, if one person make a promise to another for the benefit of a third, it is binding, and either the party to whom it is made, or the party for whose benefit it is made, may sue upon it. But to enable the latter to sue in his own

Johns. Ch. R. 51; *Stewart v. Stewart*, 6 Clark & Fin. 969; *Harvey v. Cooke*, 4 Russell, R. 34; *Gordon v. Gordon*, 3 Swanst. R. 470; *Pickering v. Pickering*, 2 Beav. R. 31, 56; *Hunt v. Rousmaniere*, 1 Peters, R. 15; s. c. 8 Wheat. R. 179.

¹ *Smith v. Pincombe*, 10 Eng. Law. & Eq. R. 50; *Groves v. Perkins*, 6 Sim. R. 576; *Evans v. Llewellyn*, 1 Cox, R. 340; 1 Story, Eq. Jurisp. ch. v. § 132 to § 138; *Langstaffe v. Fenwick*, 10 Ves. R. 405; *Stewart v. Stewart*, 6 Clark & Fin. R. 911, 966.

² See 1 Story, Eq. Jurisp. § 131, 132; *Smith v. Pincombe*, 10 Eng. Law & Eq. R. 50; *Stapleton v. Stapleton*, 1 Atk. R. 210; *Jodrell v. Jodrell*, 9 Beav. R. 45.

³ *Howe v. M'Kay*, 5 Pick. R. 44; *Brooks v. White*, 2 Metcalf, R. 283; *Kellogg v. Richards*, 14 Wend. R. 116; *Harper v. Graham*, 20 Ohio, R. 105; *Lee v. Oppenheimer*, 32 Maine R. 253; *Sibree v. Tripp*, 15 Mees. & Welsb. 23. See post, § 978 to § 982.

⁴ *Wilkinson v. Byers*, 1 Adolph. & Ell. 106. See also *Wilbur v. Crane*, 13 Pick. R. 284; *Hey v. Moorhouse*, 6 Bing. N. C. 52.

name, the rule seems to be now well established in England, that there must be a privity of contract between him and the defendant to the action. It is not required that he should be privy to the consideration, but if he be a stranger to the consideration, there must be an express promise to him from the defendant to enable him to maintain his action. Where, therefore, the declaration stated, that A. owed the plaintiff £13, and that, in consideration thereof, and that A., at the defendant's request, had promised the defendant to work for him at certain wages, and also, in consideration that A. would leave the amount, which might be earned by him, in the defendant's hands, he (the defendant) undertook and promised to pay the plaintiff the said sum of £13, and it was held, although it appeared that A. had performed his part of the agreement, that the plaintiff could not recover, because he was clearly a mere stranger to the consideration, no promise having been made to him.¹ But on the other hand,

¹ In *Crow v. Rogers*, 1 Strange, R. 592, the court without much debate held that the plaintiff was a stranger to the consideration, and gave judgment for the defendant. This case was affirmed in *Starkey v. Mill*, Style, R. 296; and the same doctrine was held in *Bourn v. Mason*, 2 Keble, R. 457, 527; S. P. stated in *Delabar v. Gold*, 1 Keble, R. 44, and *Crow v. Rogers* was again affirmed in *Price v. Easton*, 4 Barn. & Adolph. 434. In *Dutton v. Poole*, 1 Vent. R. 318, 322; s. c. 2 Levinz, R. 210, and T. Raym. R. 302, the doctrine was held, that if one person make a promise to another for the benefit of a third, the latter may maintain an action upon it, although the consideration do not move from him. This case is cited and approved by Lord Mansfield, in *Martyn v. Hind*, Cowper, R. 443; Douglas, R. 146, who said that it was a matter of surprise how a doubt could have arisen. In *Marchington v. Vernon*, 1 Bos. & Pul. 101 (note), Mr. Justice Buller lays down the same rule. See also *Rippon v. Norton*, Yelv. R. 1; *Whorewood v. Shaw*, Yelv. R. 25, and Metcalf's note (1); *Carnegie v. Waugh*, 2 Dowl. & Ryl. 277; *Bafeield v. Collard*, Aleyn, R. 1; *Bell v. Chaplin*, Hardres, R. 321; *Osborne v. Rogers*, 1 Saund. R. by Wise, 264; *Curtis v. Collingwood*, 1 Vent. R. 297; *Disborne v. Denable*, 1 Roll. Abr. 31, pl. 5; *Company of Felt Makers v. Davis*, 1 Bos. & Pul. 102. The distinction in the text is fully supported in *Williams v. Everett*, 14 East, R. 582; *Piggott v. Thompson*, 3 Bos. & Pul. 149; *Tipper v. Bicknell*, 3 Bing. N. C. 710; *Webb v. Rhodes*, 3 Bing. N. C. 734; *Wilson v. Coupland*, 5 Barn. & Ald. 228; *Lilly v. Hayes*, 5 Adolph. & Ellis, 550; *Jones v. Robin-*

where the plaintiffs were creditors, and the defendants were debtors of T., and by consent of all parties an arrangement was made that the defendant should pay to the plaintiffs the debts due from them to T., it was held, that the agreement was for a sufficient consideration.¹ So, also, where the consideration stated that the defendants, being in possession of certain mortgage deeds, of which A. was desirous to obtain an assignment by the payment of £500, and the plaintiff consented, at A.'s request, to accept bills for that amount, drawn by A., upon A.'s procuring the defendants to deliver the mortgage deed to the plaintiff as a security; and that the defendants, in consideration of the acceptance of the bills by the plaintiff, undertook to deliver the deeds to him upon his paying the amount of the bill; it was held, that this was a sufficient consideration to support the action by the plaintiff, it appearing that all the parties were together when the agreement was made.² Indeed, a privity of contract will always be implied, where the promise or agreement is made in the presence of the third person, with his assent.³

§ 451. According to the rule as laid down by the English courts, a privity of contract sufficient to enable the third person to sue directly on the contract, will only exist where a direct promise passes between them, or at least a recognition is made as between them of the promise.⁴ It has, indeed,

son, 1 Excheq. R. 456; *Thomas v. Thomas*, 2 Q. B. R. 857; *Sargent v. Morris*, 3 Barn. & Ald. R. 281; *Rowe v. Newbury*, W. Jones, R. 415; *Hammond on Parties*, 79; 1 Chitty's Plowd. 5.

¹ *Wilson v. Coupland*, 5 Barn. & Ald. 228.

² *Tipper v. Bicknell*, 3 Bing. N. C. 710.

³ *Tipper v. Bicknell*, 3 Bing. N. C. 710; *Webb v. Rhodes*, 3 Bing. N. C. 734; *Wilson v. Coupland*, 5 B. & Ald. 228; *Disborne v. Denable*, 1 Roll. Abr. 31, pl. 5; *Starkey v. Mylne*, Id. 32, p. 13.

⁴ *Price v. Easton*, 4 Barn. & Adolph. 434; *Williams v. Everett*, 14 East, R. 582; *Barlow v. Browne*, 16 Mees. & Welsb. 126; *Cobb v. Becke*, 6 Q. B. 930; *Gibson v. Minet*, Ryan & Mood. 68; *Wedlake v. Hurley*, 1 Crompt. &

been asserted, in one important case, that in the action for money had and received, a direct promise need not be shown to the plaintiff; and that if a debtor should send money to a third person for his creditor, such third person would be treated as the agent of the debtor and be accountable to the creditor for it, as money had and received to his use.¹ But this rule is not supported by the weight of authority in England, and it seems to be required in all cases that there should be privity

Jerv. 83; *Baron v. Husband*, 4 Barn. & Adolph. 611. See also ante, and cases cited. See *Bigelow v. Davis*, 16 Barb. S. C. R. 561; *Jones v. Robinson*, 1 Excheq. R. 454; *Thomas v. Thomas*, 2 Q. B. 851; *Gerhard v. Bates*, 20 Eng. Law & Eq. R. 133.

¹ *Lilly v. Hays*, 5 Adolph. & Ell. 550; s. c. 1 Nev. & P. 26. In this case it appeared, that one Wood was indebted to the plaintiff and to the defendant, and that, being absent in Scotland, he sent £100 to the defendant, and having afterwards informed the defendant that this sum was intended to be paid to the plaintiff, the defendant agreed to pay it to the plaintiff, but did not promise the plaintiff personally, and it was held, that the want of a direct promise to the plaintiff did not invalidate the consideration. Mr. Justice Patteson said, "It appears in this case, that the defendant had stated, in effect, that he held the £100 to the plaintiff's use; and had allowed him to be told so. The only question is, upon the alleged want of a consideration moving from the plaintiff. It is true that the rule of law requires such a consideration in all cases, though, in an action for money had and received, a direct consideration moving from the plaintiff is seldom shown. But, suppose that a debtor sent money to a general agent for the creditor, would there be any doubt that, as soon as the agent received it, he would be accountable to the creditor for it, as money had and received to his use? Would it be an answer, that there was no consideration moving from the creditor to the agent? Or is it not a consideration, if the money is sent to a general agent for the creditor, and received by him, he informing the creditor of it? That is the case here. The money was sent by Wood to the defendant; he admitting holding it for the plaintiff's use, and said he would pay it to him. There is a consideration moving here, through the instrumentality of Wood, the original debtor, to the defendant, as agent for the plaintiff." In this case there was virtually a promise to the third person, which created privity of contract as between him and the debtor. Had the defendant been simply an agent of Wood, he would not have been liable, on the common principle of agency, that a professed agent is only liable to third persons in case of an express promise.

of contract between the plaintiff and defendant, in order to entitle the former to sue the latter directly.¹

§ 451 *a*. There are, however, certain cases where the promise for the benefit of a third person relates to property belonging to such person, or in which he has a special right or claim, where a privity of contract will be implied; as where a remainder-man promised a father that if he would leave the wood standing on his land, he would give his daughter £1,000, and it was held that the daughter could maintain an action therefor.²

¹ See cases cited above.

² *Dutton v. Poole*, 1 Vent. R. 318, affirmed in the Exchequer Chamber, T. Raym. R. 302. So in *Piggott v. Thompson*, 3 Bos. & Pul. 149, Lord Alvanley said, "It is not necessary to discuss whether if A. let land to B., in consideration of which the latter promises to pay the rent to C., his executors and administrators, C. may maintain an action on that promise. I have little doubt however that the action might be maintained, and that the consideration would be sufficient; though my brothers seem to think differently upon this point. It appears to me that C. would be only a trustee for A., who might for some reason be desirous that the money should be paid into the hands of C. In case of marriage it is often necessary to make contracts in this manner, and the personal action is given to the trustee for the benefit of the *feme covert*." So also in *Starkey v. Mill*, Style, R. 296, it was decided that if A. give goods to B. of the value of £80, on condition that he pay £20 to C., the latter may sue B. for the £20, for it became a debt to C. So in *Marchington v. Vernon*, 1 Bos. & Pul. 101, which was an action by the holder of a bill of exchange against the assignees of a drawee, on a promise made by the bankrupt to the drawer, that he would honor the bill, Mr. Justice Buller said, that "independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action on it." This statement should be taken, however, in connection with the facts of the case, and was intended, undoubtedly, to be restrained to cases where there was a special interest or right of the third person in the subject-matter. In the case before him, the plaintiff had such a special right in the bill itself, and he could not be said to be without privity to the subject-matter of the contract, since he held the bill and was a party in direct interest. See also on this subject *Carnegie v. Waugh*, 2 Dowl. & Ryl. 277; Am. Jurist, No. 43, p. 16, 17; *Rookwood's case*, Cro. Eliz. R. 164; *Provender v. Wood*, Hetl. R. 30; *Bell v. Chaplain*, Hardres, R. 321; *Oldham v. Bateman*, 1 Rol. Abr. 31. The American cases are clear to this point. See *Mellen v. Whipple*, 1 Gray, R. 323; *Brewer v. Dyer*, 7 Cushing,

But in this and similar cases, the near relation of the parties, and the special interest in the property arising therefrom, were the ground of the decision ; — and in England a distinction is maintained between agreements in relation to specific property, or goods, and mere orders to a debtor to pay over money to a third person, in the latter case the payee having ordinarily no special property in the money until the debtor agrees to hold it for him in trust or to pay it over to him.¹

§ 451 *b*. This rather nice distinction does not however obtain in America, and the broad doctrine is here held that where one person makes a promise to another upon a valid consideration for the benefit of a third, the third person may maintain an action thereon, although he be not privy to the original promise. Nor does it seem to matter whether the promise be founded upon an agreement relating to property or specific articles belonging to the third person or in respect to which he has a special interest,² or be merely a promise to pay over to such third person a sum of money.³ And the ground

R. 337; *Carnegie v. Morrison*, 2 Metcalf, R. 381; *Gold v. Phillips*, 10 Johns. R. 412; *Schermerhorn v. Vanderheyden*, 1 Johns. R. 140; *Barker v. Bucklin*, 2 Denio, R. 48; *Farley v. Cleveland*, 4 Cowen, R. 432; *Leonard v. Vredenburg*, 8 Johns. R. 39; *Bigelow v. Davis*, 16 Barbour, S. C. R. 561-564.

¹ See ante, § 376 *v*, et seq.

² *Bigelow v. Davis*, 16 Barb. S. C. R. 563; *Arnold v. Lyman*, 17 Mass. R. 400; *Farley v. Cleveland*, 4 Cowen, R. 432; *Delaware & Hudson Canal Co. v. The Westchester Bank*, 4 Denio, R. 97; *Gold v. Phillips*, 10 Johns. R. 412; *Shear v. Mallory*, 13 Johns. R. 496; *Barker v. Bucklin*, 2 Denio, R. 45; *Cabot v. Haskins*, 3 Pick. R. 83; *Schermerhorn v. Vanderheyden*, 1 Johns. R. 139; *Lawrason v. Mason*, 3 Cranch, R. 492; *Brewer v. Dyer*, 7 Cushing, R. 340; *Mellen v. Whipple*, 1 Gray, R. 320. See ante, § 376, et seq.; *Hinkley v. Fowler*, 15 Maine, R. 285.

³ *Cabot v. Haskins*, 3 Pick. R. 91; *Hall v. Marston*, 17 Mass. R. 575; *Delaware v. Hudson Canal Co. v. Westchester Bank*, 4 Denio, R. 98; *Weston v. Barker*, 12 Johns. R. 281; *Neilson v. Blight*, 1 Johns. Cas. R. 205; *Goodrich v. Lord*, 10 Mass. R. 484; *Eagle Bank v. Smith*, 5 Conn. R. 75; *Mason v. Waite*, 17 Mass. R. 563; *Beers v. Robinson*, 9 Barr, R. 229; *Crocker v. Higgins*, 7 Conn. R. 347; *Hind v. Holdship*, 2 Watts, R. 104; *Carnegie v. Morrison*, 2 Metcalf, R. 381; *Mellen v. Whipple*, 1 Gray, R. 323. See ante, § 376, *y*. But see *Bigelow v. Davis*, 16 Barb. S. C. R. 563.

on which this rule stands is, that although the third person may be a stranger to the express promise, as between the other parties, yet the transaction creates a trust, out of which an implied promise arises to pay over the sum to the third person.

INSUFFICIENT CONSIDERATIONS.

§ 452. We now come to the second division, namely, — *Insufficient Considerations*. These we shall divide into the following classes: 1st. Gratuitous; 2d. Illegal and Impossible; 3d. Moral; 4th. Executed.

GRATUITOUS PROMISES.

§ 453. 1st. Promises, which are wholly gratuitous, are void, for want of consideration; for, however obligatory they may be in morals or in honor, inasmuch as they are not founded upon an injury or deprivation to the promisee, or a benefit to the promisor, they are not regarded by the law as legal and valuable considerations.¹ Thus, a mere promise to pay the debt of a friend is not legally obligatory, and will not support an action.² And a promissory note, given by a father to a son, in consideration of affection only, is void.³ So, also, subscriptions to public works and charities cannot be collected, if they be merely gratuitous, and have not operated to induce engagements and liabilities, within the knowledge of the subscriber.⁴ But where, on faith

¹ *Holiday v. Atkinson*, 8 Dowl. & Ry. 163; s. c. 5 Barn. & Cres. 501; *Harris v. Watson*, Peake, R. 72; *Newman v. Walters*, 3 Bos. & Pul. 612; *Wilkinson v. Byers*, 1 Ad. & El. 109; s. c. 3 Nev. & Man. 853; *Mills v. Wyman*, 3 Pick. 211; *Thorne v. Deas*, 4 Johns. R. 84.

² *Reading Railroad v. Johnson*, 7 Watts & Serg. 317.

³ *Holiday v. Atkinson*, 5 B. & C. 501; s. c. 8 D. & R. 163. See also *Dodge v. Adams*, 19 Pick. 429.

⁴ *Boutell v. Cowdin*, 9 Mass. 254; *Phillips Limerick Academy v. Davis*, 11 Mass. 113; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Stewart v. The Trustees of Hamilton College*, 2 Denio, R. 403, and 1 Comst. 591. See *Troy*

of a subscription, work has been performed, or liabilities assumed, as for instance where a building is erected or begun, an action may be maintained against any subscriber who refuses or neglects to pay his subscription.¹ But there must be a privity of contract between the plaintiffs who seek to enforce such subscription, and the defendant.² And ordinarily it is only to his co-signers, that a person is liable for his subscription. Yet if the subscribers call a meeting, and appoint a committee to carry out the object of the subscription, each subscriber, having notice of such meeting and taking part in it or assenting to its action, would be responsible to such committee for his subscribed share. But if he had no notice of such meeting he would not be liable.³ So, also, similar

Academy v. Nelson, 24 Verm. 189; *Barnes v. Perine*, 9 Barbour, R. 202; *Wilson v. Baptist Ed. Soc.* 10 Barbour, R. 309; *Galt v. Swain*, 9 Gratt. R. 633; *Foxcroft Academy v. Favor*, 4 Greenl. R. 382 and Bennett's note.

¹ *Robertson v. March*, 3 Scam. R. 198. See also *Sperry v. Johnson*, 11 Ohio R. 452; *Caul v. Gibson*, 3 Barr, R. 416; *Sandford v. Halsey*, 2 Denio, R. 235; *Johnston v. Wabash College*, 2 Carter, 555.

² *Curry v. Rogers*, 1 Foster, N. Hamp. R. 247.

³ *Curry v. Rogers*, 1 Foster, N. Hamp. R. 255. In this case the court say: "A difficulty arises here, which, upon the facts presented, cannot be obviated. There is no privity of contract between the parties to the suit, and nothing shown which can place them in the relation of debtor and creditor. If the defendant can be holden at all, in this action, it must be upon the general counts. The evidence cannot sustain the special count upon the subscription paper. The contract by that paper was with the co-signers, and not with the plaintiffs. That others signed the paper with him, is a sufficient consideration to raise a promise to pay according to the special agreement; and that consideration may be so transferred by the action of the defendant as to bind him to others for money paid. Unless some action were taken by the defendant, binding upon him, whereby he became obligated to others for the purposes of carrying out the designs of the subscribers to the paper, he could be holden to the subscribers only. This contract was with them; not with others. This committee, the plaintiffs in this action, were appointed at a meeting of some of the subscribers. There is no provision in the paper for any such meeting; but upon those who saw fit to attend it, and who took part in its proceedings, the appointment of the committee may be binding. It may be regarded as a subsequent arrangement and agreement among themselves, to abide by and

promises to individuals 'are void ; unless others are induced thereby to advance money or part with property, or to do

carry out their doings. Upon such, the plaintiffs should have a good claim. They were, in fact, employed by them to proceed and erect the building ; and we can discover no good reason why they should not have a legal cause of action, upon a count for money paid, for all sums properly expended in furtherance of the object and designs of the donors. Upon those, also, who did not attend the meeting at which the plaintiffs were appointed, but who subsequently assented to its doings and agreed to the expenditure of the money by the committee, the plaintiffs should have a claim. Upon those, too, who recognized the proceedings of the plaintiffs and ratified their doings, there may likewise be a cause of action. But this defendant stands not in the light of either. He was not notified to attend the meeting at which the plaintiffs were appointed. He neither attended that nor any other meeting ; nor did he consent to, or ratify its doings, or in any way recognize his liability thereafter. We can discover no privity of contract whatever between him and the building committee. There were no dealings or transactions of any kind between them. His contract, if any, was with his co-signors. *George v. Harris*, 4 N. H. Rep. 533. And, upon the facts presented here, it is they alone that can maintain an action, if it can be maintained at all.

"The cases cited in the argument are based upon a different state of facts, and do not sustain the plaintiffs in this suit. *Homes v. Dana*, 12 Mass. 190, was a subscription to a newspaper establishment ; and the plaintiff's intestate, Larkin, was, by the express terms of the subscription, made the trustee to receive and appropriate the money. *Trustees of Farmington Academy v. Allen*, 14 Mass. 172, was a subscription to raise funds for the establishment of an academy, 'payable to such persons as shall, or may be, by the legislature, appointed trustees.' The plaintiffs were subsequently made such trustees by the legislature, as was provided in the paper. *Bryant v. Goodnow*, 5 Pick. 228, was a subscription to establish a line of stages. The paper provided that there should be a meeting of the stockholders, for the purpose of making such arrangements, obligations, and officers, as might be necessary to carry into effect the objects proposed. A meeting was accordingly held, and the plaintiff, Bryant, chosen agent of the company, and authorized to expend money to purchase horses, coaches, and other necessary things connected with the business of the company. In each of these cases, there was something upon which to base either an express or implied promise from the defendants to the plaintiffs. In the first, Larkin was the person to whom the money was to be paid by the terms of the paper ; and in the second and third, the way was pointed out in the papers, by which the plaintiffs should become the payees of the subscribers. In the last case it is also in-

other acts to their own injury, and then they will be obligatory on the promisor, in order to avoid a fraud upon third persons.¹ This exception, however, does not apply to every gratuitous promise, which has afforded an inducement to others to make similar promises, but only to those of persons who, relying upon the performance of such promise, have, in consequence thereof, contracted liabilities and engagements, or made advances, which a breach of the original promise would enlarge or render more burdensome.² Thus, the subscription of a particular person to a charity would not be obligatory, although it may have induced many subsequent subscriptions, because no injury is done to the other subscribers, by a breach of payment by one. Yet if the subscribers had not agreed to pay a definite sum, but only their proportion in order to raise a particular sum for a specified object, and such sum had been thereto applied, so that a non-payment by one, would extend the liability of the others, the promise of each could be enforced.³

directly held, that the defendant was entitled to notice of the meeting at which the agent was appointed; and so far, that case is an authority for the defendant here; for no notice whatever, of the meeting at which the plaintiffs were appointed, was ever brought home to this defendant.

"The general principle, that in an action of assumpsit there must be either an express or an implied promise from one party to the other; that there must be privity of contract of some kind between them, is believed to hold good in all instances. It is not sufficient that moneys are advanced, or services rendered for a party, to make him liable therefor. They must have been authorized, either expressly or impliedly, or must have been subsequently sanctioned by him. There must be something, out of which an undertaking can be raised; some privity must exist between them. *Rensselaer Glass Factory v. Reid*, 5 Cowen, 603; *Carter v. Gault*, 13 Pick. 531; *Butterfield v. Hartshorn*, 7 N. H. Rep. 350."

¹ *Homes v. Dana*, 12 Mass. 190; *Trustees of Farmington Academy v. Allen*, 14 Mass. 172; *Trustees of Amherst Academy v. Cows*, 6 Pick. 427; *Cong. Soc. Troy v. Goddard*, 7 N. H. 435; *University of Vermont v. Buell*, 2 Verm. R. 48; *Macon v. Sheppard*, 2 Humph. 335; *Ives v. Sterling*, 6 Met. R. 310.

² *Am. Jur. No. 42*, vol. 21, p. 282.

³ *Limerick Acad. v. Davis*, 11 Mass. 113; *Bridgewater Acad. v. Gilbert*, 2

§ 454. So, also, merely gratuitous services will afford no consideration, upon which to raise an implied promise to pay their worth.¹ Thus, voluntary assistance in saving property from fire;² or the payment of the debts of another without request;³ or voluntarily securing property found afloat in a

Pick. 579; ante, § 118, § 129; *Crosbie v. McDonald*, 13 Ves. jr. 157. In this case the Lord Chancellor said, "Various instances may be put of *Nudum Pactum* at law. If one man says to another, he will give him £1,000 to purchase a house, and actually pays part, that is a mere voluntary promise, *Nudum Pactum*, not the foundation of an action. But put the case of a declaration, stating a promise, in consideration that the plaintiff would agree for the purchase of a house; and leaving her own residence, would go and reside in that house; and execute the conveyance; and that the plaintiff did accordingly at the special instance of the defendant make the purchase; change her residence; and, that she had been obliged to pay the money under the contract; and the defendant refused to perform his promise; would that be *Nudum Pactum*; where one party does not merely pay, but does some act; like the consideration under the head of contract in the civil law, *facio ut facias*? Suppose, for instance, A., living in Jamaica, sends a cargo to B., resident in London; who is not to receive any benefit, but is to deliver it over to another person; and is directed to insure. B. may refuse to receive the cargo; but if he consents to receive it, though it is for the benefit of the consignor, he is bound to make the insurance; and many actions have been brought upon that principle. I am not prepared to say, this case goes the whole length of that; but it deserves consideration, whether a woman, having no desire to enter into this contract, no means of performing it, another person, not merely making a spontaneous promise, but causing her upon the faith of his promise to place herself in a situation, insuring her ruin, if he should not perform it; and having executed part, which is a strong indication of the nature of the transaction, cannot in equity be compelled to execute the remainder; though the particular forms of law might not enable the plaintiff to reach it by an action. The question is, whether this is a case of that description; or mere *Nudum Pactum*; with a performance of part; giving no action for the remainder?" "The principle of law upon these actions is, that though upon a mere voluntary promise an action does not lie, yet, if one man binds himself to pay, and does pay money in consequence, of an obligation, undertaken by another, the one has money, which in equity and conscience ought to be the money of the other; and that is not *Nudum Pactum*."

¹ See *Roscorla v. Thomas*, 3 Q. B. Rep. 234.

² *Bartholomew v. Jackson*, 20 Johns. 28.

³ *Jones v. Wilson*, 3 Johns. 434; *Menderback v. Hopkins*, 8 Johns. 436;

river,¹ or beasts found straying;² will not be good ground for an action. And this is upon the plain ground stated by Ch. J. Eyre,³ that "it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude." Another reason for this rule is to be found in the annoyance and expense to which every one might be subjected, if he were obliged to pay for services, which he does not need or require, and which may be in their nature officious, although well intended.

§ 455. There is, however, an exception to this rule, which is allowed by the maritime law in cases of salvage, which is a compensation for actual services rendered in rescuing property from destruction by the perils of the sea or by pirates. This exception is founded in an enlarged and liberal policy, both to prompt the generous motives of humanity, in cases which are greatly encompassed with danger, to overcome the natural reluctance of fear, and to discourage the evil spirit of unrighteous gain and plunder, which, under the circumstances in which salvage is allowed, offers a temptation to acts, which are easily concealed, and are wholly unjustifiable. Salvage, however, is not ordinarily allowed in cases where the services rendered are within the duty of the party rendering them. The amount of compensation is liberal, and in the nature of an honorary reward, and is determined by a court of admiralty in view of the circumstances of the case. The salvors have a lien therefor, on the property saved.⁴

Beach v. Vandenburg, 10 Johns. 361; *Child v. Morley*, 8 T. R. 610; *Frear v. Hardenbergh*, 5 Johns. 272.

¹ *Nicholson v. Chapman*, 2 H. Black. 254. See *Baker v. Hoag*, 3 Barbour, 203; 7 Id. 113.

² *Binstead v. Buck*, 2 W. Black. R. 1117.

³ *Nicholson v. Chapman*, 2 H. Black. 254; Story on Bailm. § 169, p. 176.

⁴ *Abbott on Shipping*, Part 4, ch. 12; *Bearse v. 340 Pigs of Copper*, 1 Story, 314; *The Ship Blaireau*, 2 Cranch, 240.

§ 456. So, also, where a party knowingly permits another to do certain work or labor for him, without interfering to prevent it, although such work may have been commenced without his order, yet an implied promise will be raised to pay for the value of such services, unless the circumstances of the case negative such a presumption.¹ But, if a workman be employed to do a particular piece of work, and, without consulting his employer, he proceed to perform additional work, of which the employer has no knowledge, and to which he does not assent, the workman cannot recover therefor, — on the plain ground, that a man is not bound to pay for work, which he did not authorize, and which he may not wish to have done,² and of which, however beneficial it may be, he does not wish to bear the expense.

§ 457. Another exception to the general rule, is to be found in the case of a mandate, which is a bailment, in regard to which the mandatary or bailee agrees to do some act without recompense.³ No party is bound to make such a gratuitous engagement, nor after making it, is he bound to execute it. But if he accept it, and in executing it, he do it amiss, so that through his negligence or heedlessness, any damage ensue to the other party, he is responsible therefor. A mandatary is not answerable for his omissions or non-feasance of his engagement, even though special damage result, but only for his misfeasance.⁴ That is, he is not bound to begin to do it at all, but if he do begin, he must do it properly. Thus, where a party undertook, without reward, to carry several hogsheads of brandy from one cellar and deposit them in another, and he did it so negligently, that one of the casks was staved, and the brandy lost; it was held that he was answerable for the dam-

¹ Ante, § 11.

² *Hort v. Norton*, 1 McCord, R. 22.

³ Story on Bailments, § 137, ch. iii. p. 135.

⁴ Story on Bailments, § 164 to § 172, ch. iii. p. 172, &c.; Kent, Comm. Lect. 40, p. 570, 571.

age, because of his carelessness, although he was not a common carrier, and performed the service gratuitously, but that he would not have been chargeable, if the injury had been caused by the carelessness of some other person meeting him in the street.¹

ILLEGAL AND IMPOSSIBLE CONSIDERATION.

§ 458. Every contract, the consideration to which is tainted with illegality, is void; and as the consideration of a contract is twofold, moving from either party to the other, it follows, that every agreement to do an illegal act is invalid, the act being the consideration on one side.² A contract may be illegal, because it contravenes the principles of the common law, or the special requisitions of a statute. The former illegality exists, whenever the consideration is founded upon a transaction, which violates public policy or morality;— as a contract to commit, conceal, or compound a crime; a contract for illicit cohabitation; or a contract in fraud of the rights and interests of third persons. The illegality created by statute exists, when the act is either expressly prohibited, or when the prohibition is implied from the nature and objects of the statute.³

§ 459. Where a contract is founded upon two considerations, one of which is merely void, but not illegal, and the other is good, the contract will be binding, and entitle the party to damages, to the extent of the good consideration; provided, by its terms, it be susceptible of apportionment.⁴

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909, 919, 920; *Elsee v. Gatward*, 5 T. R. 143; *Wilkinson v. Coverdale*, 1 Esp. R. 75; *Rutgers v. Lucet*, 2 Johns. Cas. 92; Doct. & Stu. Dial. 2, ch. 24, p. 176. See also the case of *Thorne v. Deas*, 4 Johns. R. 84; *Balfé v. West*, 22 Eng. Law & Eq. R. 506.

² Am. Jurist, Vol. 22, No. 43, p. 23; 2 Kent, Comm. Lect. 39, p. 466.

³ Story on Bills of Exchange, § 186, p. 206. The Roman and French law inculcates the same general principles. *Quod turpi ex causa promissum est, non valet.* Inst. Lib. 3, tit. 20, § 24; Pothier on Oblig. n. 43 to 46.

⁴ *Bliss v. Negus*, 8 Mass. R. 51; *Crisp v. Gamel*, Cro. Jac. 128; *Pikard v.*

Thus, where there was a verbal agreement to sell a certain farm, and dead stock, and growing wheat, at separate prices, it was held, that the contract was distinct as to each item, and although the agreement as to the land was void, because it did not comply with the requisitions of the statute of frauds, it being oral, yet, that the agreement, as to the wheat, and dead stock, was binding.¹ If, however, the contract be an entirety, the partial failure of the consideration would wholly invalidate it.² But where one consideration, or a part of the consideration is illegal, the whole contract is void.³ So, where part of an entire agreement must be in writing, to be valid under the statute of frauds, a part of such agreement cannot be proved by parol.⁴ So, also, as there is a consideration moving from each side in every contract, the same rule applies to an agreement to do two or more acts; and in such case, if one be illegal, and the other be legal, the contract is void, but if one be merely void and insufficient, and the other be good, the contract is valid.⁵ But if the agreement be to do an act, which

Cottels, Yelv. R. 56; Com. Dig. Assumpsit, B. 13; Best v. Jolly, 1 Sid. R. 38; Cripp v. Golding, 1 Roll. Abr. 30; Action sur Cas. 7, 2; Bret v. J. S. and his wife, Cro. Eliz. 755.

¹ Mayfield v. Wadsley, 3 Barn. & Cres. 361; s. c. 5 Dowl. & Ryl. 228. See also Wood v. Benson, 2 Crompt. & Jerv. 94.

² Roby v. West, 4 N. Hamp. R. 285; Chater v. Becket, 7 T. R. 201; Loomis v. Newhall, 15 Pick. R. 167; Crawford v. Morrell, 8 Johns. R. 253; Filson v. Himes, 5 Barr, R. 452; Hall v. Dyson, 10 Eng. Law & Eq. R. 424; Howden v. Simpson, 10 Adol. & Ell. 815; Gamble v. Grimes, 2 Carter, 392.

³ Waite v. Jones, 1 Bing. N. C. 662; Featherston v. Hutchinson, Cro. Eliz. 199; Lewis v. Davison, 4 Mees. & Welsb. 654; Stevens v. Webb, 7 Car. & Payne, 60; Shackell v. Rosier, 2 Bing. N. C. 646; Scott v. Gilmore, 3 Taunt. R. 226; Bridge v. Cage, Cro. Jac. 103; Card v. Hope, 2 Barn. & Cres. 661; Jones v. Waite, 7 Scott, 317; s. c. 5 Bing. N. C. 341; Deering v. Chapman, 2 Maine R. 488; Filson v. Himes, 5 Barr, R. 452.

⁴ Forquet v. Moore, 16 Eng. Law & Eq. R. 466, and Bennett's note; Vaughan v. Hancock, 3 Com. B. Rep. 766.

⁵ Lewis v. Davison, 4 Mees. & Welsb. 654; Stevens v. Webb, 7 Car. & Payne, 60.

may be effected either by lawful or unlawful means, the law will presume in favor of the contract, that the parties contemplated the employment of legal means.¹

§ 460. If a contract grow immediately out of an immoral or illegal act, or be connected with it, as for instance, if it be to indemnify a person for an act known to be a trespass,² it is invalid. But if it be wholly disconnected from the illegal act, and founded on a new and independent consideration, it may be enforced, though the illegal act was known to the party to whom the promise was made, and he was the contriver of it.³ Thus, if A. should become answerable for expenses on account of a prosecution for the illegal exportation of goods, or should advance money to defray the expenses, these acts would constitute a new contract, founded upon a new consideration, unless such an agreement were made prior to the illegal exportation, and forming a part of the consideration therefor.⁴ This proceeds upon the ground, that the consideration of the new contract is not founded upon an illegality.

§ 461. Where the consideration is illegal, either party may take advantage of this circumstance to avoid his contract. For the law allows the guilty party to take advantage of the illegality of his own act, not with a view of conferring a benefit on him, but upon grounds of public policy.⁵ This

¹ Ibid.

² *Davis v. Arledge*, 3 Hill, S. C. 170.

³ *Hodgson v. Temple*, 5 Taunt. 181; *Toler v. Armstrong*, 4 Wash. C. C. R. 297; s. c. 11 Wheat. 258; Story, Comm. on Conflict of Laws, § 248, 249; *Jones v. Randall*, Cowp. 39; *Bryan v. Lewis*, Ry. & Mood. 386; *Howell v. Fountain*, 3 Kelly, R. 176.

⁴ *Armstrong v. Toler*, 11 Wheat. 258; Story on Conflict of Laws, § 250; *Clugas v. Penaluna*, 4 Term R. 466; *Holman v. Johnson*, Cowp. 344.

⁵ *Holman v. Johnson*, Cowp. 343; *Mackey v. Brownfield*, 13 Serg. & Rawle, 241, 242; *Griswold v. Waddington*, 16 Johns. 386; *Langton v. Hughes*, 1 Maule & Selw. 593; *Josephs v. Pebrer*, 3 Barn. & Cres. 639; 2 Kent, Comm. 467.

subject is intricately interwoven with the subject of *Illegal Contracts*, and the reader is referred to that title in the present treatise, for a more extended consideration of it.

§ 462. A contract founded upon an *impossible* consideration is void; for the law will not compel a man to attempt to do that, which is not within the limits of human capacity. *Lex neminem cogit ad vana aut impossibilia*.¹ A consideration may be impossible either in fact or in law;² that is, it may be impossible for the party physically to perform it,—as if he promise to go from Westminster to Rome in three hours; or it may not be within his legal capacity, as if he promise to discharge a party of a debt, due to a third person, without the authority of such third person.³ Thus, where a friend of a bankrupt promised to pay his assignees all such sums as the bankrupt had received on a certain partnership account, and had not accounted for, in consideration, that they would engage on their part to forbear and desist from taking an examination before the commissioners in reference to such sums, and that the commissioners would also forbear and desist from such examination, the promise was held to be void, partly upon the ground, that it was in violation of the legal duty of the commissioners and of the assignees, and partly upon the ground, that it was not within the legal power of the assignees to prevent an examination by the commissioners. Lord Kenyon, in that case, said: “The ground on which I found my judgment is this; that every person, who, in consideration of

¹ 1 Powell on Cont. 160 to 164, ed. 1790; Id. p. 178, 179.

² *Nerot v. Wallace*, 3 T. R. 17.

³ *Harvy v. Gibbons*, 2 Lev. 161. This is a case where the defendant promised to repair the plaintiff's barge, in consideration that the plaintiff would discharge him from a debt of twenty pounds due to a third person, and judgment for the plaintiff was reversed by the king's bench, on the ground that the plaintiff could not discharge a debt due to another. See also *Bates v. Cort*, 2 B. & C. 474.

some advantage either to himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact, but in law.”¹

§ 463. This rule does not, however, extend to contracts founded upon difficult, improbable, or contingent considerations; for it is the duty of the promisor well to weigh the difficulty or improbability of his consideration, before he binds himself to perform it; and the law will not help him to avoid duties, which he has deliberately imposed upon himself, so long as they are possible.² And even if a man contract to do something, which is at the time impossible in fact, but not impossible in its nature, he is liable in damages for a breach of contract for non-performance. Thus, it will be no excuse, for the non-performance of an agreement to deliver goods of a certain quality, that they could not be obtained at the particular season when the contract was to be executed.³ So, also, a covenant by a tenant to repair, is binding, although the premises occupied by him be destroyed by fire. So, also, the sickness and consequent inability of a party to perform his contract is no excuse, because he should have guarded against such a contingency.⁴ So, also, if a person undertake to de-

¹ *Nerot v. Wallace*, 3 T. R. 17.

² *Co. Litt.* 206 a; n. 1, 179; *Tufnell v. Constable*, 3 Nev. & Perry, 47; s. c. 7 Adolph. & Ell. 798; *Izon v. Gorton*, 5 Bing. N. C. 501; s. c. 7 Scott, 537; *The Brecknock Co. v. Pritchard*, 6 T. R. 750. See post, *Landlord & Tenant*; *Platt on Cov.* 569; *Blight v. Page*, 3 B. & P. 296, note; *Worsley v. Wood*, 6 T. R. 718, 719; *Huling v. Craig*, Addison, 342; 1 *Powell on Cont.* 160 to 164, ed. 1790.

³ *Gilpins v. Consequa*, 1 Pet. C. C. 91; *Youqua v. Nixon*, 1 Peters, C. C. 221; *Fischel v. Scott*, 28 Eng. Law & Eq. R. 404. See post, *Defence, Performance*. *Paradine v. Jane*, Aleyn, 26; *Atkinson v. Ritchie*, 10 East, 533; *Hadley v. Clarke*, 8 T. R. 259; *Beswick v. Swindells*, 3 Adolph. & Ell. 883; 2 *Black. Comm.* 340.

⁴ *Alexander v. Smith*, 4 Dev. 364.

liver goods at a particular place, without limitation of his liability in case of loss or injury, and they be destroyed on the way, he is responsible for the loss.¹

§ 464. Where, however, a contract, not impossible in its inception, afterwards becomes impossible to be performed, a court of equity will relieve against the performance, if no injury be thereby done to the party claiming that it shall be performed; and courts of equity will interfere to prevent the enforcement of contracts for the purpose of harassment and vexation.² But on the question of executing an agreement, hardship alone cannot be regarded as a sufficient ground of relief, unless it amount to so great a degree of inconvenience and absurdity, as to afford judicial proof that such an agreement could not have been intended by the parties.³

MORAL CONSIDERATION.

§ 465. A moral obligation is not alone a sufficient legal consideration to support either an express or implied promise; for the law, although it will not suffer any immorality, cannot undertake to enforce every promise, which a man of strict honor and integrity would feel himself bound to fulfil. The performance, therefore, of many purely moral obligations, must be left to the good faith of the individual, and it is neither within the province nor the policy of the law to apply a metaphysical standard of morality to the conduct of men in their common relations of life.⁴ Thus, where one gave a deed of

¹ *Thompson v. Miles*, 1 Esp. 184. See post, Bailments. Story on Bailments, § 36; *Paradine v. Jane*, Aleyn, R. 26, 27.

² *Smith v. Morris*, 2 Bro. Ch. R. 314.

³ *Prebble v. Boghurst*, 1 Swanst. R. 309.

⁴ See *Eastwood v. Kenyon*, 11 Adolph. & Ell. 438; *Geer v. Archer*, 2 Barb. S. C. R. 424; *Kaye v. Dutton*, 7 Man. & Gr. 807; *Jennings v. Brown*, 9 Mees. & Welsb. 501; *Littlefield v. Shee*, 2 Barn. & Adolph. 811; *Beaumont v. Reeve*, 8 Q. B. 483.

land, described as being "*supposed* to contain ninety-three acres," and upon admeasurement, it being found to be far smaller, the vendee promised to pay back a proportional part of the price, it was held, that as the terms of the contract indicated a willingness by both parties to take the risk of any mistake which there might be in the quantity, the promise was a mere *nudum pactum*.¹ So, also, where a son who was of age, was suddenly taken sick among strangers, and was relieved by the plaintiff, and thereupon the father wrote to the plaintiff promising to pay the expenses incurred, the promise was not considered sufficient to sustain an action, inasmuch as the father was not liable for the son's debts after he came of age.²

¹ *Smith v. Ware*, 13 Johns. R. 259.

² *Mills v. Wyman*, 3 Pick. R. 207. In this case Chief Justice Parker clearly lays down the whole doctrine relating to moral consideration as follows:—"General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound *in foro conscientie* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases, in which a refusal to perform such a promise may be disgraceful.

"The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

"It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preëxisting obligation, which has become inoperative by positive law, to form a basis for

So, also, a promise by a son to pay for necessities furnished to a father, was held to be void for want of consideration.¹

an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preëxisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice, the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

“ Without doubt there are great interests of society which justify withhold-

¹ Cook v. Bradley, 7 Conn. R. 57. See also Frear v. Hardenbergh, 5 Johns. R. 272. See ante, § 82 a, § 82 b, and 97 a, 97 b.

§ 466. A qualification to this rule, however, obtains in cases where there was originally a sufficient valuable consideration,

ing the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

"A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

"These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where, at some time or other, a good or valuable consideration has existed. *Cook v. Bradley*, 7 Conn. R. 57; *Littlefield v. Shee*, 2 Barn. & Adolph. 811; *Yelv. (Metcalf's ed.)* 4 a, note 1; *Parker v. Carter*, 4 Munf. 273; *M'Pherson v. Rees*, 2 Penrose & Watts, 521; *Pennington v. Gittings*, 2 Gill & Johns. 208; *Smith v. Ware*, 13 Johns. R. 259; *Edwards v. Davis*, 16 Johns. R. 281, 283, note; *Greeves v. M'Allister*, 2 Binn. 591; *Chandler v. Neale*, 2 Hen. & Munf. 124; *Fonbl. on Eq. by Laussatt*, 273, note; 2 Kent's Comm. (2d ed.), 465. Contra, *Glass v. Beach*, 5 Verm. R. 172; *Barlow v. Smith*, 4 Verm. R. 144; *Commissioners of the Canal Fund v. Perry*, 5 Ohio R. 58. See also *Seago v. Deane*, 4 Bing. 459; *Welles v. Horton*, 2 Car. & Payne, 383; *Davis v. Morgan*, 6 Dowl. & Ry. 42.

"A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to

upon which an action could have been sustained, but where, in consequence of some statute or positive rule, growing out of general principles of public policy, the right of action is suspended, and the party is exempted from legal liability. In such cases the moral obligation is sufficient to support an express promise, though it will not raise an implied promise.¹

follow, that his promise founded upon such a debt has no legally binding force."

¹ In *Geer v. Archer*, 2 Barbour, S. C. R. 424, the doctrine on this point is thus stated: — "There is a class of cases where it has been said that a moral obligation is sufficient to support an express promise; such, for instance, as the obligation to pay a debt barred by the statute of limitations, or an insolvent's discharge, or to pay a debt contracted during infancy, or coverture, and the like. But a mere moral or conscientious obligation, unconnected with a prior legal or equitable claim, is not enough. The result of all the cases on this head is summed up in a note to 3 Bos. & Pull. 249, in these words: 'An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. The rule as thus stated received the emphatic approbation of Justice Spencer in the case of *Smith v. Ward*, 13 Johns. 257. The same doctrine is substantially asserted by Bronson, J., in *Ehle v. Judson*, 24 Wend. 97; and such I believe to be the settled rule. It forms a criterion at once safe, certain, and easy to be understood and applied. Testing the present case by that rule, it is apparent that the promise cannot be upheld. The supposed obligation which is invoked for its support most clearly never could have been enforced in any tribunal known to our law. The case of *Bentley v. Morse*, 14 Johns. R. 468, cited by the plaintiff's counsel was a case of moral obligation sufficient to support an express promise within the rule above referred to. There money had been paid and a receipt taken, and afterwards the party to whom it was paid brought an action for the same money, and recovered, through the omission of the defendant to produce the receipt in evidence in his defence. A subsequent promise by the plaintiff in that action, that if the defendant had the receipt he would refund the money, was held to be valid, and supported by the moral obligation to pay the money. The court likened it to a case of a promise by an infant, to pay a debt contracted during his nonage, or of an insolvent or bankrupt to pay a debt from which he is discharged by his certificate. We hold that it is not in all cases

This exception includes all promises barred by the statute of limitations, or discharged by the bankrupt or insolvent law;¹ and promises by an adult to pay debts contracted during his infancy;² and promises by a drawer of a bill of exchange, or by an indorser of a bill or note, to pay it, although he may not have received such notice as would render him legally liable thereupon.³

necessary that the moral obligation in order to be a good foundation for an express assumpsit should be such as that, without the express promise, an action could once have been sustained upon it; but that if it could have been made available in a defence, it is equally within the rule. The test is, could it have been enforced before it was barred by the legal maxim or statute provision? Upon this ground the case of *Bentley v. Morse* is within the rule stated." See *Nash v. Russell*, 5 Barbour, 556; *Mardis v. Tyler*, 10 B. Monroe, R. 382; *Watkins v. Halstead*, 2 Sandf. R. 311; *Way v. Sperry*, 6 Cush. R. 238; *Turner v. Chrisman*, 20 Ohio R. 332; *Warren v. Whitney*, 24 Maine R. 561.

¹ *Besford v. Saunders*, 2 H. Black. 116; *Maxim v. Morse*, 8 Mass. 127; *Scouton v. Eislord*, 7 Johns. R. 36; *Erwin v. Saunders*, 1 Cow. 249; *Shippey v. Henderson*, 14 Johns. R. 178; *Willing v. Peters*, 12 Serg. & Rawle, 177; *Stafford v. Bacon*, 25 Wend. R. 384; s. c. 2 Hill, 353.

² *Barnes v. Hedley*, 2 Taunt. 184; Ante, § 71, 72, and cases cited.

³ *Hopes v. Alder*, 6 East, 16, note; *Lundie v. Robertson*, 7 East, 231, and note; *Haddock v. Bury*, by Lord Raymond; Middlesex Term, 3 Geo. 2, (M. B.); *Burnet, J.*, cited in 7 East, 231. The case of *Watson v. Turner*, Buller, N. Pr. 130, 280, would seem to settle a different doctrine. This was an action against the overseers of a parish for supplies furnished to a pauper, settled in the parish and boarding out of it, under an agreement made by the overseers and the plaintiff, and a subsequent promise made by them after the supplies were furnished to pay the bill; the agreement was enforced upon the ground, "that overseers are under moral obligation to support the poor." The true reason, however, seems to be, that they were legally bound to supply paupers casually in the parish, and paupers settled there, but resident elsewhere, and under their charge. *Simmons v. Wilmott*, 3 Esp. R. 91; *Lamb v. Bunce*, 4 M. & S. 275; 21 Am. Jur. 42; *Wing v. Mill*, 1 B. & Ald. 104. There was, also, a legal liability in the case of *Suffield v. Bruce*, 2 Stark. R. 175. See *Lee v. Mugeridge*, 5 Taunt. 36, in which it was held, that a moral obligation is a sufficient consideration to support a subsequent promise. This doctrine is, however, abridged and modified in *Littlefield v. Shee*, 2 Barn. & Ad. 811; and denied in the case of *Eastwood v. Kenyon*, 11 Adolph. & Ell. 438; *Denman, C. J.* See also *Wennall v. Adney*, 3 B. & P. 247, and the learned note of the reporters, p. 249, n. a.; Story on Bills of Exchange, § 182. But see

§ 467. There is also an exception to the rule, that a moral consideration is not sufficient to support a promise, which is admitted in the case of gratuitous bailees or trustees, holding the goods or property of another. In such case, the law raises an implied promise, on the part of the trustee, to do all those acts, which are requisite to a due performance of the trust, although it implies no agreement, that he shall receive a compensation therefor. Yet, where his promise is purely voluntary, and founded upon motives of friendship or kindness, he would only be bound to exercise good faith and reasonable diligence in executing the trust, and would be responsible only for gross negligence.¹ So, also, a gratuitous bailee of goods is bound to exercise a like degree of diligence, and will be responsible for a similar degree of negligence.²

§ 468. The ground upon which these exceptions are founded, is, that these contracts being merely *voidable* and not void, in their inception, they may be revived by a subsequent promise, provided they were originally founded upon an express or implied request by the party benefited. But, where the promise is *void, ab initio*, it is not capable of ratification. Thus, where a married woman gave a promissory note, and after her husband's death, promised, in consideration of the forbearance of the payee, to pay it, it was held, that the note was absolutely void, and that forbearance, where there was no cause of action

Greeves v. McAllister, 2 Binn. 591; Doty v. Wilson, 14 Johns. 381, which recognize the doctrine of the sufficiency of a moral consideration to support an express promise. The modern cases have, however, established the doctrine as stated in the text. See Mills v. Wyman, 3 Pick. 211, cited supra; Monkman v. Shepherdson, 11 Adolph. & Ell. 415; Beaumont v. Reeve, 15 Law Jour. Q. B. 141; Jennings v. Brown, 9 Mees. & Welsb. 501.

¹ 2 Story, Eq. Jurisp. § 1268; Manning v. Manning, 1 Johns. Ch. R. 534; Fyler v. Fyler, 3 Beavan, 550; Home v. Pringle, 8 Clarke & Fin. 264, 287; Barrell v. Joy, 16 Mass. 221; Denny v. Allen, 1 Pick. 147; Meacham v. Sternes, 9 Paige, 399.

² Story on Bailments, § 173, 174.

originally, is not a sufficient consideration to raise a promise.¹ So, also, a bare promise by an adult to pay a bond given by him as surety during his infancy would not be on sufficient consideration, because the bond was void, and what is void in its inception cannot be made good by a ratification.² So, also, where certain goods were supplied to a feme covert, living apart from her husband, and for which she, after his death, promised to pay; it was held, that the subsequent promise was void, because, the goods being supplied to her during the life of her husband, the price constituted a debt due from him,³ and not from her.

EXECUTED CONSIDERATIONS.

§ 469. A consideration, in regard to the time when it operates, is either, 1st. Executed, or something already performed before the making of the defendant's promise; 2d. Executory, or something to be done after the promise; 3d. Concurrent, as in the case of mutual promises; or, 4th. Continuing.

§ 470. These last classes, namely, Executory, Concurrent, and Continuing Considerations, are sufficient to support a contract, not void from other reasons; but it has been said that an executed consideration will not support a promise, unless it be executed at the request of the promisor.⁴ This, however, is

¹ Lloyd v. Lee, 1 Strange, 94; Watkins v. Halstead, 2 Sandf. 311. But see Vance v. Wells, 8 Ala. 399.

² Ante, § 37; Keane v. Boycott, 2 H. Black. R. 511; Tucker's Lessee v. Moreland, 10 Peters, R. 59.

³ Littlefield v. Shee, 2 Barn. & Adolph. 811; Meyer v. Haworth, 8 Adolph. & Ell. 467. Quære, whether this would be so if the husband was not bound, as in case personal credit was given to a wife who had a separate fortune? Lee v. Muggeridge, 5 Taunt. R. 36.

⁴ Osborne v. Rodgers, 1 Saund. 264, Williams's note 1; Doct. & Student, 181; 1 Rol. Abr. 11; Bac. Abr. Assumpsit, D.; Lampleigh v. Braithwait,

not a principle of law, but a rule of pleading, and amounts to nothing more than an affirmation that in assumpsit upon a contract, founded upon a consideration which is executed or past, the declaration must allege, that the consideration was executed *at the request* of the promisor, or otherwise it will not appear that it was not officious, and without his consent or knowledge.

§ 471. The difficulty, in which this subject is involved, and the apparent injustice and absurdity of some of the decisions, arise chiefly from a want of discrimination between the law and the pleadings. The decision of the court in many of the cases, which apparently affirms the principle of law, was by no means a decision upon the merits of the case, but merely upon a question of pleading; and its seeming absurdity is the result of a defective declaration. Thus, in the case of *Hunt v. Bates*,¹ which was the authority upon which many of the earlier cases were decided, the declaration averred, that the defendant promised to save the plaintiff harmless, in consideration that he had become bail for the defendant's servant, and judgment was arrested, in consequence of the defect in the pleadings. On the next page, however, of the same book, an anonymous case is reported, in which a promise to pay £20, "in consideration that the plaintiff, at the special instance of the defendant, had taken to wife the cousin of the defendant,"

Hob. 105 *b*; s. c. 1 Smith, Select Cases, 67, and the learned note of the editor, p. 69 to 76, 2d ed.; 1 Powell on Cont. 348; Am. Jur. vol. 22, No. 43; 1 Lill. Abr. 299; Child *v.* Morley, 8 Term R. 610; Stokes *v.* Lewis, 1 Term R. 20; Naish *v.* Tatlock, 2 H. Black. 319; Richardson *v.* Hall, 1 Brod. & Bing. 50; Durnford *v.* Messiter, 5 Maule & Selw. 446; 1 Dane, Abr. 119; 1 Selw. N. P. 48, 1st ed.; Hayes *v.* Warren, 2 Str. 933. If the consideration be executory, it is not perhaps absolutely indispensable to state it to be at the request of the promisor, for *ex necessitate* it seems implied. See Fisher *v.* Pyne, 1 Mann. & Grang. 265, and the reporter's note *b*; 1 Smith, Select Cases, 66 to 68, and the learned note of the editor, p. 69 to 76, 2d ed. But see Com. Dig. Pleader, C. 70; Tripps *v.* Rand, 2 Lev. 198.

¹ Dyer, R. 272, A.

was enforced at law, although the marriage was executed and past before the undertaking and promise. So, also, an affidavit of debt for money lent and work and labor done, was held to be sufficient, because it did not state that it was "at the instance and request of defendant." The court said,¹ "Money paid to and for the use of the defendant does not necessarily raise a cause of action; because a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor. So the goods may, consistently with this affidavit, have been sold and delivered to a third person for the defendant's use, without his being acquainted with the transaction; and if so, he cannot be charged with them. An affidavit which is to operate in restraint of the liberty of a party, ought to use unequivocal language." So, also, where the declaration alleged that the defendant promised to pay the plaintiff £5, in consideration that the plaintiff had delivered him twenty sheep, it was held that, as the declaration alleged a past consideration, it was not sufficient; for it did not appear that the sheep were not delivered as a gift, in which case there would have been no foundation for a promise to pay therefor.² It is impossible to suppose that this decision could be on the merits of the case, since, if the delivery were a mere bailment, the promise would have turned it into a sale. Again, where the declaration stated a promise to repay money which had been lent, it was held to be insufficient "for this cause only, that the moneys in the last promise were not said to be lent at the defendant's request, for it may be lent to his use contrary to his desire."³ It is one of the elementary principles of pleading, in the action of assumpsit, that a valid con-

¹ *Durnford v. Messiter*, 5 Maule & Selw. 445.

² *Jeremy v. Goochman*, Cro. Eliz. 442.

³ *Oliverson v. Wood*, 3 Levinz, R. 366. See also *Hayes v. Warren*, 2 Barnardiston, B. R. 141; s. c. 2 Stra. 933; *Comstock v. Smith*, 7 Johns. 87; *Parker v. Crane*, 6 Wend. 649; *Leland v. Douglass*, 1 Wend. 492; *S. P. Balcom v. Craggin*, 5 Pick. 295; *Stanhop's case*, Clayt. 65; *Hunt v. Bates*, Dyer, 272.

sideration should be alleged as a foundation for the promise, which the plaintiff would enforce, whether the consideration would, as a matter-of-fact, be implied or not. That consideration is the request of the plaintiff; and though it might be inferred as a fact by the jury, or by the law, yet an omission to state it in the declaration would, in special pleading, be a fatal defect, preventing a decision upon the merits, yet carrying to the mind of a careless reader the full effect of such a decision. This rule will explain many, if not all, of the old cases, and seems only to be founded in justice; for, unless a request be stated, it does not necessarily appear on the face of a declaration that the service rendered was beneficial, or was not gratuitous, and perhaps obtrusive; and in either of these alternatives there is no ground for the claim of the plaintiff, without an express request. But if the promise be "coupled to the consideration by the request," it becomes more than a naked promise. The result may be stated, therefore, to be, that where the consideration is past, the declaration should state that it was executed at the request of the party sought to be charged, and then if there be no vital objection on the merits the party may recover.¹

§ 472. The next question which arises, is as to the necessity of actually proving the previous request of the promisor.

¹ 1 Saund. 264, Williams's note 1; 3 Salk. 96; 1 Powell on Cont. 351, 352, edit. 1790; Sydenham v. Worlington's Godb. 33; s. c. Cro. Eliz. 42; 2 Leon. 224; Hardres v. Prowd, Style, 465; Lampleigh v. Braithwait, 1 Brownl. 7; s. c. Moore, 866; s. c. Hob. 105; Bosden v. Thinn, Cro. Jac. 18; s. c. Yelv. 40; Townsend v. Hunt, Cro. Car. 408; Comstock v. Smith, 7 Johns. 87; Livingston v. Rogers, 1 Caines, 584. See Bulkley v. Landon, 3 Conn. 76; 1 Powell on Cont. 351, 352, edit. 1790; 1 Fonb. Eq. B. 1, ch. 5, § 8, note a, 5th ed.; Com. Dig. Assumpsit, B. 12; Seago v. Deane, 4 Bing. 459; Pawle v. Gunn, 4 Bin. N. Cas. 448; 1 Smith's Select Cas. 66, and the learned note of the editor, p. 69 to 76, 2d ed.; Mills v. Wyman, 3 Pick. 207; Bell v. Morrison, 1 Peters, R. 373; Lonsdale v. Brown, 4 Wash. C. C. R. 148; Cook v. Bradley, 7 Conn. R. 57; Exeter Bank v. Sullivan, 6 New Hamp. R. 136; Levy v. Cadet, 17 Serg. & Rawle, 126; Searight v. Craighead, 1 Penn. R. 135.

And in this respect the rule seems to be, that if the consideration be one which does not raise an implied promise in law, the previous request must be actually proved, as well as declared.¹ If it be proved, it matters not whether the execution of it have or have not actually turned out to be beneficial to the promisor.²

§ 473. In what cases, then, is a promise implied by law, so as to render it unnecessary to prove such request? In the first place, a promise is implied whenever the consideration is beneficial to the party subject to be charged, and is actually adopted or taken advantage of by him.³ For, in such a case,

¹ *Kaye v. Dutton*, 7 Mann. & Grang. 807; *Victors v. Davies*, 12 Mees. & Welsb. 758. See also, Mr. Sergeant Manning's note to 1 Mann. & Grang. 265, n. (a); *Hopkins v. Logan*, 5 Mees. & Welsb. 211.

² *Ibid.* *Kaye v. Dutton*, 7 Mann. & Grang. 807.

³ 1 Fonbl. Eq. B. 1, ch. 5, § 1, note *a*, 5th ed.; 1 Saund. 264, Williams's note; *Oatfield v. Waring*, 14 Johns. 192; *Hicks v. Burhans*, 10 Johns. 243; *Doty v. Wilson*, 14 Johns. 378; *Londsdale v. Brown*, 4 Wash. C. C. R. 148; *Mills v. Wyman*, 3 Pick. 207; *Cooke v. Bradley*, 7 Conn. 57; *Exeter Bank v. Sullivan*, 6 New Hamp. 136; *Bell v. Morrison*, 1 Peters, 371; *Levy v. Cadet*, 17 Serg. & Rawle, 126; *Searight v. Craighead*, 1 Penn. 135; *Lawes*, Pl. in Assumpsit, 435; *Greeves v. McAllister*, 2 Binn. 592; 3 Burr. 1671; *Fisher v. Pyne*, 1 Mann. & Grang. 265, note *b*; 1 Smith's Select Cases, 67, 68, and the editor's learned note, p. 69 to 76, 2d ed. In cases of *indebitatus* assumpsit for goods sold and delivered, or for labor and services performed, or for money lent, it is the common practice to declare that the goods were sold and delivered, or the labor and services were performed, or the money lent, at the request of the defendant; and this allegation has usually been considered necessary. But the learned reporters, in note *b*, to the case of *Fisher v. Pyne*, 1 Mann. & Grang. 265, have expressed a decided opinion that it is not necessary, and that the existence of the debt, as a debt, is sufficient to found the right of action, whether it originally came from either the plaintiff or defendant. They insist that the note of Serg. Williams to *Osborne v. Rogers*, 1 Saund. 264, which countenances the suggestion, that a request must be alleged, is founded upon a mistake of that case, which was one of an executory contract, where it was said that no such precedent request need be stated. See Com. Dig. Pleader, C. 70. Indeed, it would seem, from the note to *Fisher v. Pyne*, that even if the consideration were past, it would be unnecessary to allege a request, if the act stated in the consideration cannot, from its nature, have

the person executing the consideration becomes* the accredited agent of the promisor by the fact that the latter adopts his act; according to the maxim, *Omnis ratihabitio retrotrahitur et mandato equiparatur*. If, however, the person sought to be charged refuse to adopt or take advantage of the consideration, when performed, a promise on his part would not be implied, since he is not bound to indemnify persons for acts done without his consent or wish, however beneficial such acts may be, unless he takes advantage of them, and refuses to ratify them.¹ Examples of this rule are to be found in cases where a husband permits his wife to receive goods which he did not authorize her to buy, and for which he knows his own credit has been pledged; and to cases where an infant retains a lease after he arrives at full age, without objecting.² So, also, where A. purchases goods for B. and B. receives them and uses them without objection, knowing that they are not a gift, a promise would be implied on his part to pay for them; and no previous request need be proved.³

§ 474. In the next place, where one man is compelled to pay money which another is bound by law to pay, a promise by the latter is raised by law to reimburse the person paying.⁴ But in these cases the plaintiff must prove that the payment was made by compulsion of law, for the benefit of the defendant; or, in other words, that it was a case where the party to whom the money was paid had a legal claim for the payment,

been a gratuitous kindness, but imports a consideration *per se*, it being immaterial to the right of action, whether the bargain, if actually concluded and executed, or the loan if made and the money actually advanced, was proposed and urged by one party or the other. See also *Mountford v. Horton*, 2 Bos. & Pul. N. R. 62. But see *Hayter v. Moat*, 2 Mees. & Welsb. 56.

¹ Ibid.

² Ante, § 72, and cases cited.

³ *The Fishmongers' Co. v. Robertson*, 5 Mann. & Grang. 192; *Law v. Wilkin*, 6 Adolph. & Ell. 718.

⁴ *Pownal v. Ferrand*, 6 Barn. & Cres. 439; *Child v. Morley*, 8 T. R. 610; *Exall v. Partridge*, 8 T. R. 308; *Jenkins v. Tucker*, 1 H. Black. R. 90.

although he was not the party justly liable therefor. To do this, he must show such a contract as the law will enforce.¹ Thus, for example, where there are co-sureties, any one of them who is compelled to pay may recover of his co-surety their proportion.²

§ 475. But wherever the law does not raise an implied promise on these grounds to pay, a previous request must be proved in order to sustain an action; for no express promise, made upon a past consideration, can be enforced, differing from that which would be implied by law.³ And this rule ob-

¹ *Pawle v. Gunn*, 4 Bing. N. C. 448, per Tindal, C. J.; *Spencer v. Parry*, 3 Adolph. & Ell. 338; *Dawson v. Linton*, 5 Barn. & Ald. 521; *Brown v. Hodgson*, 4 Taunt. R. 189. See ante, § 13 b, § 13 c.

² *Davies v. Humphreys*, 6 Mees. & Welsb. 153; *Pitt v. Purssord*, 8 Mees. & Welsb. 538.

³ *Roscorla v. Thomas*, 3 Q. B. 234. This was an action for the breach of the warranty of a horse. "The declaration alleged that, in consideration that the plaintiff, at the request of the defendant, had bought of him a horse for £30, the defendant promised that he was sound and free from vice." It was objected, in arrest of judgment, that the executed consideration would not support the subsequent express promise that the horse was sound. The court held, after *Cur. Adv. Vult*, that "the promise in the present case must be taken to be, as in fact it was, express: and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not. The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to *Wenall v. Adney*, 3 Bos. & Pul. 249, and in the case of *Eastwood v. Kenyon*, 11 Ad. & Ell. 438. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law." *Jackson v. Cobbin*, 8 Mees. & Welsb. 790; *Brown v. Crump*, 6 Taunt. R. 300; *Granger v. Collins*, 6 Mees. & Welsb. 458; *Hopkins v. Logan*, 5 Mees. &

tains, not because the consideration is executed, but because, unless it be beneficial to the promisor, and adopted by him, or create a legal liability on his part, it would be merely a moral consideration, which, as we have seen, is not sufficient alone to support a promise.¹ The rule, therefore, is not, that an executed consideration will not support a contract, for although it be executed, the law will imply a promise wherever it does not appear to be merely moral.

§ 476. If the consideration be "executed in part only," it is called a "*continuing consideration*."² The rule, applicable to the pleadings upon continuing considerations, differs from that which prevails in the pleadings upon executed considerations. And although, if the consideration appear to be wholly executed and past, a precedent request is indispensable to support the declaration; yet if the consideration appear, on the face of the declaration, to be a continuing consideration, it is substantially good, although no precedent request be averred. Although the consideration move from a third person, yet if it be a continuing consideration, it will be sufficient to support a promise made to the person, for whose benefit the consideration moved. Thus, if A. deliver money to B. for the use of C., and B. afterwards promise C. to pay it, the promise is binding.³

§ 477. The following are examples of continuing considerations: Where the plaintiff declared, that the defendant married a maid, who sojourned in the plaintiff's house, and did

Welsb. 241; *Victors v. Davies*, 12 Mees. & Welsb. 758; *Lattimore v. Garrard*, 1 Exch. 809.

¹ *Jennings v. Brown*, 9 Mees. & Welsb. 501; *Eastwood v. Kenyon*, 11 Adolph. & Ell. 438; *Monkman v. Sheperdson*, 11 Adolph. & Ell. 415.

² Com. Dig. Assumpsit, B. 12; Powell on Cont. 349, ed. 1790; *Loomis v. Newhall*, 15 Pick. R. 159; *Andrews v. Ives*, 3 Conn. R. 368.

³ *Lilly v. Hays*, 5 Adolph. & Ell. 548; *Williams v. Everett*, 14 East, 582; Com. Dig. Assumpsit, B. 15; 2 Story, Eq. Jurisp. § 1041.

"then desire the plaintiff, that his wife might still continue in the house a year longer, to which the plaintiff agreed; and afterwards, about the middle of the year, the defendant promised, in consideration, that the plaintiff would suffer the wife to continue in the house for the whole of the year, he would pay the plaintiff for the whole year, as well the past as the future;" this was held to be a good consideration.¹ So, also, a promise, in consideration that the lessee then in possession, under an unexpired lease, had paid his rent well, to save him harmless, during the whole term past, as well as future, was held to be binding, on the ground, that "prompt payment of the rent, is a continuing consideration, when he (the tenant) remains in possession."² So, where a father promised A. to pay him a certain sum of money if A. would marry his daughter, at his (the father's) request, and there was no agreement as to the time when the money should be paid; it was held to be a sufficient continuing consideration for a promise to pay it, made after the marriage, although the plaintiff married the daughter without the consent and knowledge of the father.³

¹ *Cotton v. Wescott*, 3 Bulst. 187; s. c. 1 Roll. R. 381. See also *Merriwether's case*, Clayt. 43; 1 Lil. Ab. 114; Bac. Abr. Assumpsit, B. 12, D.; 1 Powell on Cont. 349, et seq. ed. 1790; *Warcop v. Morse*, Cro. Eliz. 138; *Loomis v. Newhall*, 15 Pick. 159; *Powley v. Walker*, 5 T. R. 373; *Adams v. Dansey*, 6 Bing. 506.

² *Pearle v. Unger*, Cro. Eliz. 94. See also *Jones v. Clarke*, 2 Bulst. 73, Com. Dig. Assumpsit, B. 12; 1 Pow. on Cont. 350, ed. 1790.

³ *Marsh v. Rainsford*, Cro. Eliz. 59; s. c. 2 Leon. 111; *Sandhill v. Jenny*, Dyer, 272, b; 3 Salk. 96; *Townsend v. Hunt*, Cro. Car. 408. But quære whether, if there had been no promise before the marriage, the promise after the marriage, which is alleged to have been at the request of the father, would be good. The authorities on this point are contradictory. In *Marsh v. Kavenford*, it is held to be good, upon the ground that the natural affection of the father doth continue, and her advancement is a sufficient cause. This doctrine is affirmed in *Oliverson v. Wood*, 3 Lev. 366. But *Sandhill v. Jenny*, Dyer, 272 b, maintains the contrary doctrine. See *Comyn's Dig. Assumpsit, Action on the Case*, B. 12, and *Powell on Cont. 350*, ed. 1790; *Sydenham v. Worlington*, 2 Leon. 224; *Godb. 33*.

In fact, marriage is always considered as a continuing consideration, and a promise made in consideration thereof is valid and can be enforced, although it be made after marriage.¹

§ 478. The same rule applies to the common case of a promise in respect to an existing debt, or legal liability, still binding upon the party promising, provided that the promise be such as the law will imply.² But if the promise exceed or differ from the promise implied by law, it would in such a case be void. Thus, an existing debt is a sufficient consideration for a promise by the debtor, to pay it *in præsenti*, or upon demand; but it will not support a promise to pay it at a future fixed time.³

§ 479. If the consideration be executory, it is not indispensable to aver a precedent request, because it would be necessarily implied;⁴ but a performance by the plaintiff must be alleged, and then a special request to the defendant to pay; although in many cases the general conclusion, *licet sæpe requæsitus*, will be sufficient.⁵

TOTAL OR PARTIAL FAILURE OF CONSIDERATION.

§ 480. We shall now consider the effect of a total or partial failure of consideration. Where the consideration of a contract totally fails, that is, when that which was supposed to be

¹ *Barker v. Halifax*, Cro. Eliz. 741; *Oliverson v. Wood*, 3 Levinz, R. 366.

² *Hodge v. Vavisor*, 1 Roll. 414. See *Lee v. Maddox*, 1 Leon. 168; *Russell v. Buck*, 11 Vermont, 166; *Roscorla v. Thomas*, 2 Gale & Davidson, 508.

³ *Hopkins v. Logan*, 5 Mees. & Wels. 247. See also *Roscorla v. Thomas*, 2 Gale & David. 508.

⁴ See *Fisher v. Pyne*, 1 Mann. & Grang. 265, note *b* by the Reporters; 1 Smith's Select Cases, 67, and the learned note of the editor, p. 69 to 76, 2d edit.; Com. Dig. Pleader, C. 69, C. 70; Com. Dig. Assumpsit, B. 12.

⁵ Com. Dig. Pleader, C. 70 to 75; Chitty on Plead, 322, 323, 324, 3d London edit. 1817.

a consideration turns out to be none, the contract, as far as the immediate parties are concerned, may be avoided, and the same rule applies as if there never had been any consideration. Thus, if a lease should be made of a house, and it should turn out to be burned at the time, as the consideration would totally fail, no contract would arise.¹ Again, where the title to goods sold totally fails, the contract would not be binding, and may be rescinded, even though the possession of the vendee be wholly undisturbed.² So, also, where goods are sold under the warranty that they are of a particular kind or quality, or adapted to a particular use, and they turn out to be utterly valueless, and not to answer the description, the contract is at an end, and they need not even be returned.³ So, also, where a note has been given, a total failure of consideration is a sufficient defence to a suit brought between the immediate parties to enforce payment;⁴ but not as to third persons holding *bonâ fide*, for value received, before it became due.⁵

§ 481. Where the consideration only partially fails, it will not afford a ground to rescind the contract utterly, unless it be an entire contract, or unless the failure be in so material a point that, had it been known, the bargain would not have been made.⁶ If the contract were entire, a partial failure would be equivalent to a total failure, unless a partial performance were accepted without objection, in which case an agreement would

¹ Farrar v. Nightingal, 2 Esp. R. 639; Graham v. Oliver, 3 Beav. R. 124; Waddington v. Oliver, 2 Bos. & Pul. N. R. 61.

² 2 Kent, Comm. Lect. 39, p. 469; 2 Story, Eq. Jurisp. § 779; Paton v. Rogers, 1 Ves. & B. 351; Graham v. Oliver, 3 Beav. R. 124; Hill v. Buckley, 17 Ves. R. 394.

³ Poulton v. Lattimore, 9 Barn. & Cres. 259; Story on Sales, § 408, 458.

⁴ Story on Bills of Exchange, § 184, 187.

⁵ Story on Bills of Exchange, § 184, 187, 188; Robinson v. Reynolds, 2 Adolph. & Ell. (N. S.) 196.

⁶ Casamajor v. Strode, 1 Coop. Sel. Cas. 510; Roffey v. Shallcross, 4 Mad. Ch. R. 227; Johnson v. Johnson, 3 Bos. & Pul. 162.

be implied to render it severable, and the party would only be bound proportionally to the part performed.¹ If the failure be in respect to a material point touching the essence of the consideration, it would also afford a good ground in equity to set aside the contract; or if the party to whom the consideration moves should choose to insist on the partial performance, he could reduce the consideration on his part proportionally.² Thus, if a certain number or quantity of goods be sold, and the seller can only give a valid title to a part, or can only deliver a part, the remainder being burned while at his risk, the buyer is only bound to pay for the part received, and if the purchase-money be paid, he may recover proportionably to the deficiency.³ But where a contract is not entire, and the failure is not in respect to a material point touching the essence of the contract, so that there may be a compensation in damages for this deficiency, the contract cannot be rescinded, but the party is put to his special action thereon for damages.⁴ If a note be given, and the consideration do not totally fail, but only partially, the deficiency cannot be pleaded in reduction of the amount, in an action on the note, but a special action for damages should be brought;⁵ for as the note is in its nature entire, the defence thereto must be entire and go to the whole claim. So, also, where the consideration only partially fails,

¹ Ibid. Ante, § 23 *a*, § 24, § 25.

² *Franklin v. Miller*, 4 Adolph. & Ell. 599; *Boone v. Eyre*, 1 H. Black. R. 273, note *a*; *Street v. Blay*, 2 Barn. & Adolph. 461; *Davis v. Street*, 1 Car. & Payne, 18; *Damer v. Langton*, 1 Car. & Payne, 168; *Weston v. Downes*, 1 Doug. R. 23; *Mavor v. Pyne*, 3 Bing. R. 285.

³ *Oxendale v. Wetherell*, 9 Barn. & Cres. 386.

⁴ Story on Sales, § 204, 205, 423, and cases cited; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Casamajor v. Strode*, 1 Coop. Sel. Cas. 510; *Roffey v. Shallcross*, 4 Mad. Ch. R. 227.

⁵ *Tye v. Gwynne*, 2 Camp. R. 346; *Moggridge v. Jones*, 14 East, R. 486; *Morgan v. Richardson*, 1 Camp. R. 40; *Parish v. Stone*, 14 Pick. R. 209; *Grant v. Welchman*, 16 East, R. 207; *Perley v. Balch*, 23 Pick. R. 283; *Shepherd v. Temple*, 3 N. Hamp. R. 455; *Beecker v. Vrooman*, 13 Johns. R. 302; *Day v. Nix*, 9 Moore, R. 159.

it is a defence, *pro tanto*, in suits on contracts respecting personal property, work, labor.¹ Thus, if a contract be made to build a house for a specified sum in a particular manner, and the work actually done be inferior to that contemplated in the agreement, the defendant may, upon proof of such fact, reduce the plaintiff's compensation to an equivalent of the actual benefit received.²

§ 482. Where the title partially fails as to the whole subject-matter of a contract, as if goods be sold which are under mortgage, or incumbrance of any sort, the contract may be wholly rescinded.³ Where a contract is founded upon *two* considerations, one of which is merely void, but not illegal, and the other is sufficient, it will be binding,⁴ and entitle the party to damages to the extent of the good consideration. Thus, a promise in consideration of an assignment of a title by dower, and of forbearing to sue an attachment out of chancery upon a decree, will be enforced; because, although a title to dower cannot be assigned at law, but only released to the terre-tenant, the forbearance is sufficient to support the contract.⁵ But if a promise be made upon *two* considerations, one of which is illegal or fraudulent, it is void, even although

¹ See Kent, Comm. 472, as to the case of real property.

² 2 Stark. Ev. 97, 280, 640; 3 Stark. Ev. 176; *Hayward v. Leonard*, 7 Pick. 181; *Tye v. Gwynne*, 2 Camp. 346; *Parish v. Stone*, 14 Pick. 210; *Mondel v. Steel*, 8 Mees. & Welsb. 858; *Bac. Abr. Rent*, L.

³ 2 Kent, Comm. Lect. 39, p. 470; *Farrer v. Nightingal*, 2 Esp. R. 639; *Graham v. Oliver*, 3 Beav. R. 124; *Hill v. Buckley*, 17 Ves. R. 194; *Paton v. Rogers*, 1 Ves. & Beam. 351; *Story on Sales*, § 423, and cases cited.

⁴ *Bliss v. Negus*, 8 Mass. 51; *Pikard v. Cottels*, *Yelv.* 56; *Crisp v. Gamel*, *Cro. Jac.* 128; *Bruer v. Southwell*, *Style*, 58; *Shann v. Bilby*, *Style*, 280; *Best v. Jolly*, 1 Sid. 38; *Onslow*, *Nisi Prius*, 145; 1 Lill. Abr. 297; *Com. Dig. Assumpsit*, B. 13; *Mayfield v. Wadsley*, 3 Barn. & Cres. 361; *Wood v. Benson*, 2 Crompt. & Jerv. 94.

⁵ *Com. Dig. Assumpsit*, B. 13. An assignment of a title to dower would probably be now held to be valid in equity, and, therefore, a sufficient consideration. See 1 *Story, Eq. Jurisp.* § 624, &c. ch. 12. But this does not impugn the principle of the case.

the other consideration be good.¹ Thus, if a bill of exchange be given partly for spirituous liquors sold contrary to law, and partly for money lent, it is not binding.² So, also, where a party covenants in the alternative to do one of two specified things, if one of them be illegal, the whole agreement will be void.³ But if the agreement be to do an act which may be effected either by lawful or unlawful means, the law will presume in favor of the contract an intention to perform it legally, for illegality will not be presumed, but must be proved.⁴ So, also, where there is one consideration, and it is partially illegal, the contract is void.⁵

§ 483. By the common law, the want of an adequate consideration is no defence to an action on a bond, or on any other sealed instrument;⁶ although, in some of the States in the Union, either local custom or statute has given validity to such a defence.⁷ Indeed, mere inadequacy of consideration, where it is not of so gross a nature as to indicate fraud on the one side, or utter incompetency on the other, will not, of itself, invalidate an agreement, either in law or in equity.⁸ But a total

¹ *Featherston v. Hutchinson*, Cro. Eliz. 199; *Morris v. Chapman*, T. Jon. 24; *Bridge v. Cage*, Cro. Jac. 103; *Crawford v. Morrell*, 8 Johns. 253; Com. Dig. Covenant, F.; Story on Bills of Exchange, § 187; *Waite v. Jones*, 1 Bing. N. C. 662.

² *Scott v. Gillmore*, 3 Taunt. 226; s. c. 3 Scott, 52; *Bliss v. Negus*, 8 Mass. 50; *Shackell v. Rosier*, 2 Bing. New Cas. 646.

³ *Lewis v. Davidson*, 4 Mees. & Welsb. 654; *Stevens v. Webb*, 7 Car. & Payne, 60; *Waite v. Jones*, 1 Bing. N. C. 656; s. c. 5 Bing. N. C. 341; *Shackell v. Rosier*, 2 Bing. N. C. 646; Story on Sales, § 504; Ante, § 431.

⁴ *Ibid.* *Lewis v. Davidson*, 4 Mees. & Welsb. 654; *Waite v. Jones*, 1 Bing. N. C. 656; s. c. 5 Bing. N. C. 341.

⁵ *Ibid.*

⁶ 2 Black. Comm. 446; 1 Fonbl. Eq. B. 1, ch. 5, § 1, note a; *Sharington v. Strotton*, Plowd. 308; 1 Powell on Cont. 341, 342; *Borell v. Dann*, 2 Hare, R. 440.

⁷ *Case v. Boughton*, 11 Wend. R. 106; *Swift v. Hawkins*, 1 Dallas, R. 17.

⁸ Ante, § 115; 1 Story, Eq. Jurisp. § 245, 246; *Borell v. Dann*, 2 Hare, R. 440, 450; *Follett v. Rose*, 3 McLean, R. 332; *Robinson v. Schly*, 6 Cobb, Georgia R. 515.

failure of the consideration constitutes a good defence generally to an action on a sealed as well as an unsealed instrument; for if the foundation of the covenant fail, the covenant fails also.¹ Thus, it will be a good defence to an action by the lessor for rent, that the lessee had been evicted from the premises, either by the lessor, or by any person having a paramount title.²

§ 484. The rule applies, also, to cases of an eviction of the lessee from part of the premises by the lessor, the rent not being apportionable; but if the eviction be by a stranger, with title paramount, the eviction is only a discharge *pro tanto*, because the rent is in such case apportionable.³ But an eviction from a part of the land by the lessor is no defence to an action on any other covenant, as to repair the premises, which the lessee can still perform;⁴ and the reason of this difference seems to be, that the rent is founded upon an actual enjoyment of the land, and, as it were, issues out of it.⁵ So, if a lease be agreed on, and the lessee execute his part, and the lessor do not execute his part, whereby there is no lease, the covenants in the indenture sealed by the lessee are void. So, also, is a bond given for the performance of the covenant. Indeed, wherever the consideration for the covenants in a sealed instrument wholly fails, or is wholly void, the covenants are also void.⁶

¹ Com. Dig. Covenant, F.; Yelv. 18; Ante, § 480.

² *Salmon v. Smith*, 1 Saund. R. 204, note 2; *Jordan v. Twells*, Cas. Temp. Hard. 161; *Dorrel v. Andrews*, 11 Hob. R. 190, and note by Williams; *Neele v. Mackenzie*, 1 Mees. & Welsb. 747; *Hayne v. Maltby*, 3 T. R. 438, 442; Bac. Abr. Rent, L. M.; Com. Dig. Covenant, F.

³ Bacon, Abr. Rent, L. M.; *Newton v. Allin*, 1 Adolph. & Ell. (N. S.) 518.

⁴ *Newton v. Allin*, 1 Adolph. & Ell. (N. S.) 518.

⁵ Bacon, Abr. Rent, L.

⁶ Com. Dig. Covenant, F. and cases there cited.

CHAPTER XVIII.

ILLEGAL AND FRAUDULENT CONTRACTS.

§ 485. THE next subject of which we propose to treat is that of unlawful contracts. Contracts are sometimes said to be illegal, either because the consideration of the promise is illegal, or because the promise itself is illegal. The illegality of the consideration has been already adverted to. But the distinction between an illegal promise, and an illegal consideration, seems purely technical, inasmuch as the promise constitutes the consideration on one side. That this technicality exists, is evident from the form of pleading on a contract, in which the party plaintiff must allege both a legal consideration, and a legal promise, in order to maintain his action.¹ The distinction tends to convey the erroneous impression, that the party from whom the legal consideration moves, may enforce his claim against the party promising to perform an illegal act, though the latter party cannot enforce the contract against the former. This, however, is an entire mistake. Every executory contract, the consideration of which is illegal, on either side, is void; and neither party can found any claim upon it against the other party. If the contract be executed, however, that is, if the wrong be already done, the illegality of the consideration does not confer upon the party guilty of the wrong the right to renounce the contract; for the general rule is, that no man can take advantage of his own wrong; and the innocent party,

¹ Powell on Cont. 176, ed. 1790.

therefore, is alone entitled to such a privilege.¹ But if both parties be guilty, neither can ordinarily obtain relief on their contract, either at law or in equity. This rule is not, however, without modifications and exceptions; but before proceeding to consider them, it becomes necessary to notice a position which has been supported by high authorities in the law.

§ 486. The general rule is, that, where an illegal contract has been made, neither courts of law nor of equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they have been equally cognizant of the illegality,—according to the maxim, “*In pari delicto potior est conditio defendentis et possidentis.*” Yet this rule is not without exceptions, which are allowed on the ground of public policy. An illegal contract will never, indeed, be enforced, if it be executory; but if it be executed, in despite of a statute or rule of public policy prohibiting it, relief will often be granted, not only by setting aside the agreement, but by ordering a repayment of money paid under it. But relief will never be granted where the parties are *in pari delicto*, unless in cases where public policy would be thereby promoted; for it is not the benefit of the party, but of the public, that is regarded.

§ 487. It was maintained by Blackstone, where an act, not immoral in itself, is either enjoined or prohibited by statute, and the rule is enforced by the annexation of a pecuniary penalty to the transgression thereof, that there is nothing intrinsically immoral or illegal in the infringement thereof, provided, that the prescribed penalty, which he considered in the nature of an alternative rather than a punishment, be duly paid.² Hence arose a distinction, which was repeatedly

¹ Taylor v. Weld, 5 Mass. 116.

² 1 Blackstone, Comm. 58. “In relation to those laws, which enjoin only positive duties, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any mixture of moral guilt, annexing a penalty to non-

affirmed in the courts, between *mala prohibita* and *mala in se*; the former being merely violations of statute provisions, involving no immorality, and considered as offences only because they were forbidden, while the latter were transgressions of the moral code, as well as of the legal code of duties.

§ 488. But this distinction has been long since abrogated, as utterly unsound, and every act is now considered to be illegal in itself, which is expressly forbidden, either by statute or otherwise.¹ Indeed, it is difficult to see the object of the penalty, unless it be interpreted as a prohibition of the offence; for, in any other view, taxation, rather than penal prohibition, would seem to be its aim, and any one might purchase a right to transgress the statute law. Lord Holt supports the doctrine that an agreement to do acts, which are *mala prohibita*, is void, for want of consideration, "because," he says, "a penalty implies a prohibition; thence, no prohibitory words in the statute." Upon this reasoning, which seems to be conclusive, all the late decisions have been founded, and the rule is now perfectly established, that no agreement to do an act, forbidden by statute, or to omit to do an act, enjoined by statute, is binding.²

§ 489. But although a contract is equally void, whether it

compliance, here, I apprehend, conscience is no further concerned than by directing a submission to the penalty, in case of our breach of those laws, &c. In these cases, the alternative is offered to every man; either abstain from this, or submit to such a penalty; and his conscience will be clear, whichever side of the alternative he thinks proper to embrace." "*Lex pure pœnalis obligat tantum ad pœnam non item ad culpam; lex pœnalis mixta et ad culpam obligat et ad pœnam.*" Saunderson de Conscient. Oblig. prael. 8, § 17, 24.

¹ Bank of U. S. v. Owens, 2 Peters, R. 538; Aubert v. Maze, 2 Bos. & Pul. 371; Watts v. Brooks, 3 Ves. Jr. 612.

² Bartlett v. Vinor, by Lord Holt, Carth. 252; Clark v. Protection Ins. Co. 1 Story, 109; De Begnis v. Armistead, 10 Bing. 110; Cope v. Rowlands, 2 Mees. & Welsb. 153; Bensley v. Bignold, 5 Barn. & Ald. 335.

be *malum in se*, or merely *malum prohibitum*; yet the position of the parties, as to their remedies, is not the same in both cases. The general rule is, that where an illegal contract has been made, neither a court of law nor of equity will interpose to grant relief to the parties thereto, if they have been equal partakers and promoters of the illegality, but will leave them where it finds them; according to the maxim: *In pari delicto potior est conditio defendentis et possidentis*.¹ But, in order that this rule should take full effect, one of two requisites must occur. First, the contract must have been *malum in se*, involving criminality or moral turpitude; or, second, if it be merely *malum prohibitum*, it should appear that the parties are in equal fault, *in pari delicto*, and that the contract is executed.

§ 490. And in the first place, if a contract be *malum in se*, being essentially immoral and criminal, neither party has any remedy against the other. Nor can money paid thereupon be reclaimed at law or in equity.² If, therefore, a sum of money be paid by way of bribe,³ or for the compounding of a felony,⁴ or as a premium for future prostitution,⁵ it cannot be recovered on refusal of the other party to perform his part of the contract. Nor can an action be brought to enforce the performance of the contract. *Ex turpi contractu non oritur actio*.

§ 491. In the next place, where the contract is *malum prohibitum*, and does not involve any moral turpitude or crimi-

¹ See cases cited post.

² *Howson v. Hancock*, 8 T. R. 577; *Smith v. Bromley*, Doug. R. 696; *Browning v. Morris*, Cowp. 790; *White v. Franklin Bank*, 22 Pick. R. 184; *Lowell v. Boston and Lowell Railroad Co.* 23 Pick. R. 32; *Inhab. of Worcester v. Eaton*, 11 Mass. R. 376.

³ *Browning v. Morris*, Cowp. R. 793.

⁴ *Inhab. of Worcester v. Eaton*, 11 Mass. R. 376; *Collins v. Blantern*, 2 Wils. R. 347.

⁵ Post, § 185; *Matthews v. L—e*, 1 Madd. R. 558; *Binnington v. Wallis*, 4 Barn. & Ald. 650.

nality, one party may, under certain circumstances, have a remedy against the other party on an executed or executory contract; and this rule is admitted on grounds of public policy. And first, if the contract be executed, the title of either party to relief, will depend upon whether both parties are in equal fault, *in pari delicto*. If they be *in pari delicto*, no relief will be granted, but they will be left remediless, their contract will not be set aside, and any money which may have been advanced, cannot be recovered.¹ But if they be not *in pari delicto*, the rule is directly the reverse.² Whenever, therefore, one party, acting under circumstances of great need, or oppression, or hardship, or great inequality of condition, makes a contract in violation of a law, or rule of public policy, intended to *protect* persons against oppression, or extortion, or deceit, he is not in equal fault, and he may recover of the other any money that he may have advanced, or he may have his contract set aside;³ and relief is granted in such cases, on

¹ *Browning v. Morris*, Cowp. R. 793; *White v. Franklin Bank*, 22 Pick. R. 188; *Williams v. Hedley*, 8 East, R. 378; *Smith v. Bromley*, 2 Doug. R. 696; *Lowell v. Boston and Lowell Railroad Co.* 23 Pick. 32; *Inhab. of Worcester v. Eaton*, 11 Mass. R. 376. See also 1 Story, Eq. Jurisp. § 298, 299, and cases cited. *Howson v. Hancock*, 8 T. R. 575; *Collins v. Blantern*, 2 Wilson, R. 347.

² *Browning v. Morris*, Cowp. R. 792; *White v. Franklin Bank*, 22 Pick. R. 188; *Smith v. Bromley*, 2 Doug. R. 696; *St. John v. St. John*, 11 Ves. R. 535; *Hatch v. Hatch*, 9 Ves. R. 298; *Roche v. O'Brien*, 1 Ball & Beat. 358; *Neville v. Wilkinson*, 1 Bro. Ch. R. 548; *Lowell v. Boston and Lowell Railroad Co.* 23 Pick. 32.

³ *Ibid.* 1 Story, Eq. Jurisp. 321; *Smith v. Bromley*, 2 Doug. R. 696. In this case Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover; and it is astonishing that the Reports do not distinguish between the violation of the one sort and the other." See also *Bosanquet v. Dashwood*, Cas. Temp.

the ground that the public interest, and not solely the private interest of the individual requires it.¹ This rule applies to cases of usurious contracts, wherein it is considered that the lender has availed himself of the necessities or urgencies of the borrower, to extort from him an unlawful rate of interest; and an action for money had and received will lie, therefore, for the excess paid beyond the principal and lawful interest thereon.² So, also, the same doctrine applies to money paid as a premium for a lottery ticket.³

§ 492. Again, if the contract be executory, to do an act not immoral in itself, but prohibited by some special rule of public policy, and one party advance money in consideration of the future execution of the illegal act, the intermediate time between such advance and the performance of the act is a *locus pœnitentiæ*, during which he may rescind his contract, and utterly abandon it, and recover the money advanced.⁴ And this rule obtains, although the parties be in equal fault.⁵ Thus, where money was advanced to procure a place in the customs, and an action was brought therefor before the place had been procured, it was held that the plaintiff could recover.⁶

Talb. 37, 40; *Chesterfield v. Janssen*, 2 Ves. R. 156; *Jones v. Barkley*, 2 Doug. R. 684.

¹ 1 Story, Eq. Jurisp. § 298; *St. John v. St. John*, 11 Ves. R. 535; *Lacausade v. White*, 7 T. R. 535.

² *Astley v. Reynolds*, 2 Strange, R. 916; *Browning v. Morris*, Cowp. 793; *Vandyck v. Hewitt*, 1 East, R. 98.

³ *Browning v. Morris*, Cowp. R. 793; *Jacques v. Golightly*, 2 W. Black. R. 1073.

⁴ *White v. Franklin Bank*, 22 Pick. R. 189; *Tappenden v. Randall*, 2 Bos. & Pul. 467; *Aubert v. Walsh*, 3 Taunt. R. 277; *Lowry v. Bourdieu*, 2 Doug. R. 470; *Utica Ins. Co. v. Kip*, 8 Cowen, R. 20; *Cotton v. Thurland*, 5 T. R. 405; *Jacques v. Withy*, 1 H. Black. R. 67; *Morris v. McCulloch*, 1 Ambl. R. 432.

⁵ *Ibid.*

⁶ *Walker v. Chapman*, Loft, R. 342; *White v. Franklin Bank*, 22 Pick. R. 189.

But in such a case, the money can only be recovered upon the ground of an utter abandonment of the contract, and the plaintiff must be careful not to affirm the contract by his action. The ground upon which this rule obtains is, that it tends to prevent the execution of illegal contracts, and while it is productive of no injustice to either party, promotes public policy and good morals.

§ 493. Illegal contracts may be divided into two classes, 1st. Contracts which violate the common law; 2d. Contracts which violate the statute provisions.

CONTRACTS IN VIOLATION OF THE COMMON LAW.

§ 494. This class of contracts we shall subdivide, for the sake of convenience, into the following classes. 1st. Contracts void on account of fraud; 2d. Contracts void on account of immorality; 3d. Contracts in violation of public policy.

CONTRACTS VOID ON ACCOUNT OF FRAUD.

§ 495. 1st. Fraud has been defined to be "every kind of artifice employed by one person for the purpose of deceiving another," and this is sufficiently descriptive of fraud.¹ The courts, however, have strenuously refused to attach any exact definition to the term, or to lay down any except general rules in respect to it. For fraud is as difficult to define, as it is easy to perceive; and any positive definition or rigid rule would be

¹ The following definitions of fraud were given in the Roman law: "*Dolum malum Servius quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur. Labeo autem, posse [et] sine simulatione id agi, ut quis circumveniatur: posse et sine dolo malo, aliud agi, aliud simulari; sicuti faciunt, qui per ejusmodi dissimulationem deserviant, et tuentur vel sua vel aliena. Itaque ipse sic definiit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est.*"

easily evaded by craft, so as to place cases manifestly fraudulent beyond its exact limits. Through this wise abstinence, therefore, fraud remains undefined, and unlimited by any forms, but is to be inferred from the special circumstances of every case. Wherever it occurs, it vitiates the transaction tainted by it, both in law and equity. No agreement, although it be apparently fair, and in compliance with the formalities of law, can be enforced, if it be essentially unfair, and fraudulent. For a contract, to be binding, must be not only within the letter, but also within the spirit of law. And unless it be made in good faith, and free from the stain of fraud and imposition, it will be spurned from the threshold of every legal tribunal.¹

§ 496. It is not necessary, that the fraud should arise from either party personally. The fraud of an authorized agent will invalidate a contract, entered into by him, in behalf of his principal. Thus, where an agent sold a picture belonging to his principal, and knowingly permitted the vendee to be deceived in relation to a fact, which would have materially influenced his judgment, the contract was held to be void, as against the purchaser.² And where an agent has made a contract with a third person, although he have transcended the real limits of his authority, yet if the principal ratify it, and make the contract his own by availing himself thereof, he is liable in like manner as if he had personally made the contract. If, therefore, the agent have made misrepresentations, the principal is bound thereby; for the latter cannot ratify the contract, and avoid the responsibility of the representations, which

¹ See *Fermor's case*, 3 Co. 77; *Bright v. Eynon*, 1 Burr. 390; *Foxcraft v. Devonshire*, W. Black. 193, and cases there cited; *Ludlow v. Gill*, 1 Chip. 49; *Duncan v. McCullough*, 4 Serg. & Rawle, 483; *Dingley v. Robinson*, 5 Greenl. 127; *Ferguson v. Carrington*, 9 Barn. & Cres. 59.

² *Doe d. Willis v. Martin*, 4 Term R. 39; *Fitzherbert v. Mather*, 1 T. R. 12; *Hill v. Gray*, 1 Stark. 434; *Cornfoot v. Fowke*, 6 Mees. & Welsb. 358. See *Fox v. Mackreth*, 2 Bro. Ch. R. 420.

formed its basis, but he must avoid or ratify the contract *in toto*.¹ Again, where a party has made a false representation to one person as an inducement to a contract, and he knows that that person has stated such representation to a third person, who, upon faith thereof, makes a contract with the first party, the intermediate person will be considered as an agent of the first party by implication. Thus, where A., being about to sell a public-house, falsely represented to B., who was about to purchase it, that the receipts were £180 a month, and B., to the knowledge of the defendant, communicated this misstatement to the plaintiff, who became the purchaser instead of B., it was held, that an action lay against the seller, he having, by his silence, made the representation of B. his own.²

¹ See *Fitzsimmons v. Joslin*, 21 Verm. 129; *Hough v. Richardson*, 3 Story, R. 689. In this case, Mr. Justice Story said, "The sale, then, being made by Moulton, not as himself the owner — which he was not — but as the agent of the owners, it follows, that they are bound by his representations made at the time touching the sale, as a part of the *res gestæ*; and as to the purchasers, it makes no difference whether these representations were made by the authority of the owners or not, if they were material to and constituted the basis of the sale, and it was made by the purchaser on the faith and credit of these representations. Under such circumstances, the sale is good in the entirety, or not good at all. The owners have no right to insist upon the validity of the sale independent of the representations. The whole must be taken together as a part of one and the same transaction. It cannot be adopted in part and rejected in part. It must be taken as good for the whole or not at all. I have on several occasions expressed my opinion upon this point; and especially in the case of *Daniel v. Mitchell* and others, 1 Story, R. 172; and in another case recently argued — *Doggett v. Emerson* and others — and decided in favor of the plaintiff. The case of *Small v. Atwood*, 1 Younge, R. 407, and the same case on appeal, *Atwood v. Small*, 6 Clarke & Finell. R. 232, go far to support the same doctrine, although somewhat distinguishable in its circumstances." *Doggett v. Emerson*, 3 Story, R. 729; *Veazie v. Williams*, 3 Story, R. 612.

² *Pilmore v. Hood*, 6 Scott, R. 827; s. c. 5 Bing. N. C. 97. See *Gerhard v. Bates*, 20 Eng. Law and Eq. R. 129; *Crocker v. Lewis*, 3 Sumner, R. 8; *Hunt v. Moore*, 2 Barr, 105; *Weatherford v. Fishback*, 3 Scam. 170; *McCracken v. West*, 17 Ohio, 16.

§ 497. The party guilty of fraud cannot, however, avoid the contract, for no man can take advantage of his own wrong,¹ unless it be in some few instances, excepted upon grounds of public policy. It is solely at the option, therefore, of the party upon whom the fraud is practised, whether he will be bound by the agreement or not.² Yet, if he determine to avoid a contract because of the fraud, he must give notice of such determination to the other party, within reasonable time after his discovery of the fraud.³ And if, with knowledge of the fraud, he acquiesce in the contract expressly; or bring an action on the contract,⁴ or do any act importing an intention to stand by it; or remain silent under circumstances, which plainly indicate a continuing assent thereto, he cannot afterwards avoid it; for, practically, no man is injured, if he know of the deceit which is practised, and consent to it, since the deceit becomes then an agreed fact of the case.⁵ If, therefore, he make a compromise of the whole matter, or release the other party from liability, or expressly waive all right to proceed against him, he is bound thereby as by a new agreement.⁶ So, also, if he treat the subject-matter as his own, as by selling or leasing, he cannot avoid the contract on the ground of fraud, even although he should afterwards discover some new incident to the same fraud, making it more to his injury than he supposed.⁷ So, also, if, when a contract is

¹ See *Bessey v. Windham*, 6 Q. B. Rep. 166; *Nichols v. Patten*, 18 Maine, 231.

² *Steel v. Brown*, 1 Taunt. R. 381; *Deady v. Harrison*, 1 Stark. R. 60.

³ *Masson v. Bovet*, 1 Denio, R. 69; *Herrin v. Libbey*, 36 Maine, 350; *Tisdale v. Buckmore*, 33 Maine, 461. And if possible must put the other party in *statu quo*. *Poor v. Woodburn*, 25 Verm. 234.

⁴ *Ferguson v. Carrington*, 9 Barn. & Cres. 59.

⁵ *Campbell v. Fleming*, 1 Adolph. & Ell. 40; s. c. 3 Nev. & Man. 834; *Selway v. Fogg*, 5 Mees. & Welsb. 83; *Miles v. Deel*, 3 Stark. R. 25.

⁶ *Vigers v. Pike*, 8 Clarke & Finell. 580; *Parsons v. Hughes*, 9 Paige, R. 591; *Hough v. Richardson*, 3 Story, R. 695, 698.

⁷ *Ibid.* *Campbell v. Fleming*, 1 Adolph. & Ell. 40; *Selway v. Fogg*, 5 Mees. & Welsb. 83; *Masson v. Bovet*, 1 Denio, R. 69.

made for work to be done at a stipulated price, and it is discovered, before the work is commenced, that there has been such a misrepresentation as to its value as to afford to the party engaging a ground to repudiate the contract, yet if he do not complain, but prosecute the work, he can demand no more than the contract price.¹ But so long as he remains in ignorance that he has been defrauded, his conduct will not be considered as importing such an acquiescence therein, as to deprive him of taking advantage of the fraud within reasonable time after his actual discovery thereof.² Nor does it

¹ *Saratoga Railroad Co. v. Row*, 24 Wend. R. 74. And see *Blydenburgh v. Welsh*, Baldwin, 331; *Lamerson v. Marvin*, 8 Barbour, R. 10; *Selway v. Fogg*, 4 Mees. & Welsb. 83; *Campbell v. Fleming*, 1 Adolph. & Ell. 40.

² *Doggett v. Emerson*, 3 Story, R. 740. In this case, which was a sale of timber lands, under a false representation that they contained a great amount of timber, a bill was brought, after the lapse of six years, on which the plaintiff was held to be entitled to recover. Mr. Justice Story said: "In the next place, as to the lapse of time. This in many cases is a most important consideration, and weighs much, and sometimes, *Est maximi et momenti ponderis*, especially when there has been a great change of circumstances as to the character and value of the property, in the intermediate period; and *a fortiori*, where the party complaining has been fairly put upon his diligence, and has had ample means of inquiring as to all the material facts, and has chosen to lie by in gross indifference and indolence. This question does not indeed seem fairly open upon the present pleadings. The bill charges that the plaintiff first discovered the gross fraud and imposition practised upon him in July, 1841, and, as it should seem, by means of the memorial of Emerson to the Commissioners, in March, 1841, and their report thereon made in July, 1841. The answer sets up no denial to this statement of the bill; and does by implication admit its correctness. But whether this be a just inference or not, it seems to me, that the lapse of time cannot interpose any bar to the relief asked by the bill, if otherwise well founded; for the memorial of Emerson is of itself clear proof, that he was before that time fully aware of all the material facts; and there is no pretence to say, that he communicated them to the plaintiff. Neither is it shown, that the plaintiff had, by any other means, obtained suitable information to put him upon inquiry. In short, for aught that appears in the case, the plaintiff never discovered the gross falsity of the representations made to him until the memorial and report brought it home to his knowledge. Besides, as was remarked by the Lord Chancellor in *Partridge v. Usborne*, 5 Russ. R. 195, 232, when one party to a contract makes a

matter, as to his right of recovery, what length of time passes before his discovery of the fraud, provided he had not the means of discovering it before, and provided he is not guilty of *laches*.¹ Lapse of time, however, always constitutes an objection to the maintenance of a suit; since the fact that a long time has passed without complaint or perception of injury, would indicate an absence of fraud; and still greater weight would be given thereto, if it should appear to have operated to obscure or destroy the evidence in rebutter of fraud or greatly to change the circumstances of the case.² But if, in addition to the lapse of time, the party claiming to recover, had the means of knowledge, he must plainly show that he has not been guilty of *laches*, or he cannot recover.³ It is not, however, considered as *laches* in a party not to proceed immediately to verify representations, on the basis of which he makes a contract, but he will be allowed reasonable time to do so.⁴ But where a man is guilty of gross *laches*, in not employing means of knowledge within his reach, and proceeds to treat the subject-matter as his own, and to sell it, or use it, for his advantage and to its injury, he could not claim to set his contract aside, even in equity, on the ground of fraud. *A fortiori*, if a man be cognizant of all the circumstances, and do not complain, but deal with the other party as

positive representation, it is not *laches* in the other not to proceed immediately to verify that representation. At all events, the defence is not put upon any such ground as the lapse of time, and knowledge by the plaintiff of the material facts, so as to have called upon him for precise proofs of his real situation and of the time when he first discovered the full nature and extent of the deception practised upon him. So, that it seems to me, that the court is not called upon in this case, by the state of the pleadings and evidence, to act upon any such defence as the lapse of time, whatever, under other circumstances, might have been the just value of any such defence."

¹ Ibid. *Irvine v. Kirkpatrick*, 3 Eng. Law and Eq. R. 17.

² *Hough v. Richardson*, 3 Story, R. 695, 698; *Doggett v. Emerson*, 3 Story, R. 740; *Sanborn v. Stetson*, 2 Story, R. 481; *Veazie v. Williams*, 3 Story, R. 611; *Atwood v. Small*, 6 Clark & Finell. 351.

³ Ibid. *Hough v. Richardson*, 3 Story, R. 695.

⁴ *Partridge v. Usborne*, 5 Russ. 195; *Doggett v. Emerson*, 3 Story, R. 740.

if he had no case against him, he would, as has been said, "build up, from day to day, a wall of protection for such opponent, which will probably defeat any attack on him."¹

§ 497 *a*. The general rule is, that before a party can rescind a contract and recover the advances he may have made thereon, he must restore the other to the condition in which he stood before the contract was made; but in cases of fraud, where the subject-matter of the contract has become so entangled and complicated as to render it impossible to do this, the injured party, upon offering to restore the property received and to reinstate the other into his previous condition, as far as it lies in his power, may rescind the contract and recover his advances.²

¹ By Lord Cottenham in *Vigers v. Pike*, 8 Clarke & Finell. 562; *Sanborn v. Stetson*, 2 Story, R. 481; *Veazie v. Williams*, 3 Story, R. 611.

² *Masson v. Bovet*, 1 Denio, R. 69. In this case Beardsley, J., said: "The party who would disaffirm a fraudulent contract must return whatever he has received upon it. This is on a plain and just principle. He cannot hold on to such part of the contract as may be desirable on his part, and avoid the residue, but must rescind *in toto*, if at all.

"It was urged on the argument that a contract cannot be rescinded by one of the parties alone, so as to authorize a recovery by him of what had been paid upon it, unless the other party is thereby fully restored to the condition in which he stood before the contract was made. This is certainly the general rule; but in cases of fraud, such as this was, it can only mean that the party defrauded, if he would rescind the contract, must return or offer to return every thing he received in execution of it. To retain the whole, or a part only of what was received upon the contract, is incompatible with its rescission; and hence the necessity of restoring what had been received upon it.

"This is not exacted on account of any feeling of partiality or regard for the fraudulent party. The law cares very little what his loss may be, and exacts nothing for his sake. If, therefore, he has so entangled himself in the meshes of his own knavish plot, that the party defrauded cannot unloose him, the fault is his own; and the law only requires the injured party to restore what he has received, and, as far as he can, undo what had been done in the execution of the contract. This is all that the party defrauded can do, and all that honesty and fair dealing require of him. If these fail to extricate the

§ 498. But where both parties have been guilty of a fraudulent intention, the law refuses to interfere, and leaves them as it finds them.¹ Thus, if A. should open a policy of insurance on his ship, then at sea, and deliver it to B., to underwrite upon it, allowing him until the next day to consider the offer, and in the mean time A. should privately learn that the ship was lost, and, with the intention of misleading B., should write to him, that, if he had not signed the policy, he need not, as the ship had been heard from; and B., not having then signed the policy, but being misled by the letter to suppose the ship was safe, should then sign the policy and return it to A., intending thereby to gain the premium, without running any risk; in such a case, as each party would have intended a fraud upon the other, to obtain some advantage, the law would doubtless refuse redress to both.

§ 499. It is an established rule in law and in equity, that fraud will never be presumed, but must be clearly established by proof, *dolum ex indiciis perspicuis probari convenit*.² It is not, however, necessary, that positive and express proof thereof should be given; for, whenever it is manifestly indicated by the circumstances and condition of the parties contracting, it will be presumed to exist. Nor is it necessary, in order to found a right in the party defrauded to recover on the contract, that the guilty party should appear to have been bene-

wrongdoer from the position he has assumed in the execution of the contract, it is in no sense the fault of his intended victim, and upon the principles of eternal justice, whatever consequences may follow, they should rest on the head of the offender alone." See *Stevens v. Austin*, 1 Met. R. 557; *Howard v. Cadwallader*, 5 Blackf. R. 225; *Martin v. Roberts*, 5 Cush. R. 126; *Frost v. Lawry*, 15 Ohio R. 200.

¹ *Taylor v. Weld*, 5 Mass. 116; *Deady v. Harrison*, 1 Stark. 60; *Robinson v. McDonnell*, 2 Barn. & Ald. 134; *Doe d. Roberts v. Roberts*, 2 Barn. & Ald. 369; *Yelv.* 196; 1 Story, Eq. Jurisp. 61; *Holman v. Johnson*, Cowp. 341; *Hannay v. Eve*, 3 Cranch, 212; *Warburton v. Aken*, 1 McLean, 460; *Gondy v. Gebhart*, 1 Ohio St. R. 262.

² Cod. Lib. 2, tit. 21, § 6.

fited by the fraud, or to have colluded with the person who is.¹ But it will not be implied from doubtful circumstances, which only awaken suspicion.² Courts of equity are, however, invested with a more extensive and unrestricted jurisdiction than courts of law, in cases of fraud; and will often grant relief, in cases where the circumstances and evidence would be inadequate to support a verdict, founded thereupon, in a court of law.³ But although the powers of courts of law are more restricted, yet, wherever fraud is clearly proved by the evidence to exist, it will always furnish a good ground of relief at law to the full extent of its jurisdiction, although it may not be given in the same way as by a court of equity; and if relief can be practically and satisfactorily administered through the forms of laws, it will be granted there as readily as in equity.⁴

§ 499 *a*. In cases of fraud, the general rule is, that a court of equity has jurisdiction, even although the party deceived may obtain relief by an action at law.⁵ But where the complainant does not seek to set aside the contract *in toto*, but merely to recover a compensation in damages, his proper remedy is by an action at law, inasmuch as this is properly a question for a jury.⁶

¹ Pasley *v.* Freeman, 3 T. R. 51.

² Gould *v.* Gould, 3 Story, R. 540; Trenchard *v.* Wanley, 2 P. Will. 166; Chesterfield *v.* Janssen, 2 Ves. 155, 156; Fullagar *v.* Clark, 18 Ves. 483; 1 Story on Eq. Jurisp. § 190.

³ 1 Story, Eq. Jurisp. § 190; Chesterfield *v.* Janssen, 2 Ves. 155, 156; Fullagar *v.* Clark, 18 Ves. 483; Boynton *v.* Hubbard, 7 Mass. R. 112.

⁴ Boynton *v.* Hubbard, 7 Mass. R. 112; Jackson *v.* Burgott, 10 Johns. R. 457; Bright *v.* Eynor, 1 Burr. R. 396; Hazard *v.* Irwin, 18 Pick. R. 95; Boring *v.* Singery, 2 Har. & Johns. 455; Singery *v.* The Attorney-General, 2 Har. & Johns. 487; Corbett *v.* Brown, 8 Bing. R. 33; Polhill *v.* Walter, 3 Barn. & Adolph. 114.

⁵ Bradley *v.* Bosley, 1 Barbour, Ch. R. 149.

⁶ Ibid.; Cocke *v.* Hardin, Litt. Sel. Cas. 374; Russell *v.* Clarke's Ex'rs, 7 Cranch, R. 69; Newhan *v.* May, 13 Price, R. 749; Blackwell *v.* Oldham, 4 Dana, R. 195; Hardwick *v.* Forbes's Adm'r, 1 Bibb, R. 212.

§ 500. Where contracts are made with persons of weak intellects, or whose minds are enfeebled by disease, the law is peculiarly scrutinizing, and is very prompt to imply fraud, wherever the circumstances indicate that any improper advantage has been taken, or any urgent influence has been exerted upon such persons; and it will raise a presumption of fraud, where, if the case were one of a person in full exercise of his faculties, no such presumption would be raised.¹ Thus,

¹ *Blachford v. Christian*, 1 Knapp, R. 77. In this case, Lord Wynford said, "The law will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no court of justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property; indeed, from the fluctuation in prices, owing principally to the gambling spirit of speculation that unhappily now prevails, it would be difficult to determine what is an inadequate price for any thing that is sold; at the time of the sale, the buyer probably calculates on a rise in the value of the article bought, of which he would have the advantage; he must not, therefore, complain if his speculations are disappointed, and he becomes a loser instead of a gainer by his bargain. But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood; a bargain, therefore, into which a weak one is drawn under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man. If this conveyance could be impeached on the ground of the imbecility of Fitzsimmons only, a sufficient case has not been made out to render it invalid; for the imbecility must be such as would justify the jury, under a commission of lunacy, in putting his property and person under the protection of the chancellor; but a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed." See also *Gartside v. Isherwood*, 1 Bro. Ch. R. App. 560, 561; 1 Story, Eq. Jurisp. § 234 to 238, and cases cited; *Malin v. Malin*, 2 Johns. Ch. R. 238; *Huguenin v. Baseley*, 14 Ves. R. 290; *Ball v. Mannin*, 3 Bligh, R. (N. S.) 1; *Bennet v. Wade*, 2 Atk. R. 325, 329; *Osmond v. Fitzroy*, 3 P. Wms. R. 130; *Ex parte Allen*, 15 Mass. R. 58; *M'Diarmid v. M'Diarmid*, 3 Bligh, (N. S.) 374.

where A., being eighty-three years of age, was entitled to the annual produce of a fund of the value of £6,000, during his life, and he executed a deed, assigning all his right therein to his daughter and her husband, to whom the reversion belonged, in consideration of an annuity of £40 a year; and in a suit instituted to reduce the deed, it was admitted that the assignor was very weak and infirm, and addicted to intoxication; and it also appeared, that the deed was drawn up by the agent of the daughter and her husband, and that no agent or attorney was employed in behalf of the father; under these circumstances, it was held, that the deed was void, on the ground of over-influence.¹ It is not necessary in such cases, that the party should appear to have been so completely imbecile as to justify a jury, under a commission of lunacy, in putting his person and property under the protection of a court of chancery; but if he appear to have been of a feeble understanding, and the bargain be so unconscionable as to betoken imposition, it will be set aside in equity.² But if the person be possessed of an ordinary understanding, and no fraud have been practised on him, the mere fact that his bargain is imprudent, or greatly to his disadvantage, will afford no ground to free him from it.

§ 501. In cases of wills, over which the common law has a peculiar jurisdiction, the rule in respect to competency and strength of intellect is more strenuous than in cases of ordinary contracts. And it is required that every person, who makes a will, should be of sound and disposing memory, that is, that he should be possessed of sufficient understanding to dispose of his estate with judgment and discretion; and whether he be or not, is to be collected from his words and

¹ *M'Diarmid v. M'Diarmid*, 3 Bligh, (N. S.) 374. See also *Farnam v. Brooks*, 9 Pick. R. 212.

² *Blachford v. Christian*, 1 Knapp, R. 77; *Malin v. Malin*, 2 Johns. Ch. R. 238; *Willis v. Jernegan*, 2 Atk. R. 251; 1 Story, Eq. Jurisp. § 236; *Gartside v. Isherwood*, 1 Bro. Ch. R. App. 559, 560, 561.

acts at the time, and not merely from his being able to give a plain answer to a common question.¹

§ 502. But mere inadequacy of consideration will not alone be sufficient to avoid a contract, unless it be of so gross a nature, or under such circumstances, as to indicate improper advantage taken, and undue influence exerted over the mind of a person, and then relief will be granted in equity, not on the ground of inadequacy of consideration, but on the ground of fraud, as evidenced thereby.²

§ 503. By the Roman law a distinction was made between cases of positive fraud or *dolus malus*, and cases where one had acquired an advantage over the other by sharpness and craftiness; *solertia* or *dolus bonus*. As to the latter, the maxim was: *In pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire*.

§ 504. So, also, by the Roman and Scottish law, the contract was only liable to reduction on account of fraud, where fraud was employed to induce a party to make a contract (*ubi dolus debet causam contractui*) which he would not otherwise have made. Where the fraud is merely incident to the contract, that is, when a party intending previously, and of his own accord, to enter into a contract, is merely deceived in *modi contrahendi*, the contract is not thereby vitiated, but the party defrauded has a claim for damages to the extent of his injury. This distinction does not, however, obtain in the common law, and is not admitted in equity.³

¹ Per Story, J. 1 Story, Eq. Jurisp. § 238; Donegal's case, 2 Ves. R. 407, 408; Attorney-General v. Parnter, 3 Bro. Ch. R. 441; Jackson v. Burgott, 10 Johns. R. 457, 462; Bright v. Eynor, 1 Burr. R. 396; Bennet v. Vade, 2 Atk. R. 324.

² Ante, § 115; Davidson v. Little, 10 Harris, Penn. R. 245.

³ In regard to the latter class, Pothier says: "Dans le for intérieur, on doit regarder comme contraire à cette bonne foi, tout ce qui s'écarte tant soit

§ 505, Fraud is of various kinds; but by far the largest number of cases consist either in misrepresentation, or concealment. We shall therefore divide the subject into these two classes. 1st. Misrepresentation; 2d. Concealment.

MISREPRESENTATION.

(§ 506. Where a party designedly misrepresents a certain fact, for the purpose of misleading and imposing upon the other party, to his injury, he is guilty of positive fraud; *dolum malum ad circumveniendum*.¹ Nor is it any matter, by what means such misrepresentation is effected, whether by silence, by acts, or by words, or signs, or artifices of any kind; it is

peu de la sincérité la plus exacte et la plus scrupuleuse : la seule dissimulation sur ce qui concerne la chose qui fait l'objet du marché, et que la partie avec qui je contracte auroit intérêt de savoir, est contraire à cette bonne foi ; car puisqu'il nous est commandé d'aimer notre prochain autant que nous-mêmes, il ne peut nous être permis de lui rien cacher de ce que nous n'aurions pas voulu qu'on nous cachât, si nous eussions été à sa place. Dans le for extérieur, une partie ne seroit pas écoutée à se plaindre des ces légères atteintes que celui avec qui il a contracté auroit données à la bonne foi ; autrement il y auroit un trop grand nombre de conventions qui seroient dans le cas de la rescision, ce qui donneroit lieu à trop de procès, et causeroit un dérangement dans le commerce. Il n'y a que ce qui blesse ouvertement la bonne foi qui soit, dans ce for, regardé comme un vrai dol, suffisant pour donner lieu à la rescision du contrat, tel que toutes les mauvaises manœuvres et tout les mauvais artifices qu'une partie auroit employés pour engager l'autre à contracter ; et ces mauvaises manœuvres doivent être pleinement justifiées." This doctrine seems also to obtain in the Scottish law. Pothier des Oblig. Pt. 1, art. 3, No. 30, p. 19. It is perhaps unnecessary to say, that by the "for intérieur," Pothier means the conscience, which is governed by principles of morality only ; while by the "for extérieur," he means the courts of law, which are governed solely by the practical law.

¹ Laidlaw v. Organ, 2 Wheat. 178, 179 ; Pidecock v. Bishop, 3 Barn. & Cres. 605 ; Smith v. The Bank of Scotland, 1 Dow, Parl. R. 272 ; 1 Story on Eq. § 192 ; Evans v. Bicknell, 6 Ves. 174, 182 ; Cochran v. Cummings, 4 Dall. 250 ; Prentiss v. Russ, 16 Maine R. 30 ; Smith v. Richards, 13 Peters, R. 26 ; Murray v. Mann, 2 Excheq. 538 ; Watson v. Poulson, 7 Eng. Law & Eq. R. 585.

fraud, if the party upon whom they are practised be actually deceived thereby.¹ Again, any material misrepresentation, although it be not embodied in the contract, is considered as a constructive or legal fraud, if it be known by the person making it to be false. Nor would it seem to be necessary to prove a fraudulent intent or motive on his part; for if a person be actually deceived by a misrepresentation, the practical result is the same, whether it were a wilful fraud or not. It would also seem, upon general principles, that where one party to a contract suffers injury from the false representation of the other party in respect to a material fact, he who has thereby occasioned the injury should bear the loss, whether his statement were known to him to be false or were made through ignorance, mistake, or carelessness, and supposed to be true, — on the plain ground, that before one party undertakes to make a material statement vital to the contract and for his own interest, he is bound to ascertain whether it is true or false. This rule should of course be limited to cases where the false statement is in respect to a fact, of which the party making it professes to have knowledge, and should not extend to statements merely of belief or opinion, made in good faith. But if a person assume to know a material fact, when he does not know it, and falsely represent it, it is difficult to see why he should not be responsible for the injury occasioned thereby, whether his representation were in good faith or not. The good faith seems to be of no consequence, it is the incorrectness of the statement which has induced the injury and operated as a legal fraud. No person in making a contract is authorized to state a matter merely of belief as a matter-of-fact of which he has knowledge, — if he do so, and the fact he states be material, and operate as a distinct inducement to the contract, he should be responsible therefor.¹ As regards third persons not

¹ 3 Black. Comm. 166; 1 Story, Eq. 202; 2 Kent, Comm. Lect. 39, p. 482; Dig. Lib. 2, tit. 14, C. 7, § 9; Dig. Lib. 18, tit. 1, C. 43, § 2; Pothier, de Vente, 234, 237, 238; *Cochran v. Cummings*, 4 Dall. 250; *Warner v. Daniels*, 1 Woodbury & Minot, 91.

privity to the contract and deriving no interest therefrom, it may well be said that they should only be responsible for statements known by them to be false or made in bad faith; but as regards the parties themselves, the case would be different. The parties have no such right to rely on the gratuitous representations of third persons, that they have to rely upon the representations of each other. In the one case, the statement is without a consideration to support it; in the other, the statement operates as inducement and consideration to make the contract. It cannot be said, however, that this doctrine is clearly settled.¹ On the contrary, although it is asserted by

¹ This doctrine has undergone many fluctuations, and the cases are so contradictory, that it is impossible to lay down any rule as a settled one. Wherever the misrepresentation is embodied in the contract, there is no doubt that it will vitiate the contract, whether it be wilful or not. But where the misrepresentation is not embodied in the contract, there seems to be a great conflict of authorities as to whether it is or is not necessary, that a person, who makes a misrepresentation, should make it with knowledge of its falseness, in order to enable the other party deceived to avoid the contract. In *Pawson v. Watson*, Cowp. R. 785, one of the earliest cases, which was an action on a policy of insurance, alleged to have been made in a false verbal misrepresentation, Lord Mansfield said: "There is no distinction better known to those who are at all conversant in the law of insurance, than *that* which exists between a *warranty* or condition which makes part of a written policy, and a *representation* of the state of the case. Where it is part of a written policy, it must be performed; as if there be a warranty of convoy, there it must be a *convoy*; nothing tantamount will do, or answer the purpose; it must be strictly performed, as being part of the agreement; for there it might be said, the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement. If, in a life policy, a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy; because by the warranty he takes the risk upon himself. But if there is no warranty, and he says, 'the man is in good health,' when in fact he knows him to be ill, it is *false*. So it is, if he does not know whether he is well or ill; for it is equally false to undertake to say that which he knows nothing at all of, as to say *that* is true, which he knows is not true." In *Hodgson v. Richardson*, 1 Wm. Black. R. 463, Yates, J., says: "The concealment of material circum-

many of the most distinguished judges, it is denied in most of the late cases in England. It may be said to be established,

stances vitiates all contracts upon principles of natural law." In *Haycraft v. Creasy*, 2 East, R. 92, the question first directly arose, as to whether the knowledge of the person making a representation, that it was false, was necessary to constitute a fraud. In this case Lord Kenyon said: "It was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent, not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud, such as is presumed in all the cases within the statute of frauds. The fraud consists, not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know. There are, it is true, some duties of imperfect obligation as they are called, the breach or neglect of which will not subject a party to an action. If I know that one in whose welfare I am interested is about to marry a person of infamous character, or to enter into commercial dealings with an insolvent, it is my duty to warn him; but no action lies if I omit it; but if any one becomes an actor in deceiving another; if he lead him by any misrepresentations to do acts which are injurious to him; I learn from all religious, moral, and social duties that such an action will lie against him to answer in damages for his acts. And when I am called to point out legal authorities for this opinion, I say that this case stands on the same grounds of law and justice as the others which have been decided in this court on the same subject." In *Schneider v. Heath*, 3 Camp. R. 506, Sir James Mansfield said: "It signifies nothing whether a man represent a thing to be different from what he knows it to be, or whether he makes a representation which he does not know, at the time, to be true or false, if in point of fact it turns out to be false." So, also, Mr. Chief Justice Best, in *Adamson v. Jarvis*, 4 Bing. R. 66, says: "He who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is, both in morality and law, guilty of falsehood, and must answer in damages." Again, the House of Lords held the same doctrine in the case of *Humphrys v. Pratt*, 5 Bligh, (N. S.) 154. So also in *Railton v. Matthews*, 10 Clarke & Fin. 934, there is a dictum of Lord Tottenham to the same effect. In *Cornfoot v. Fowke*, 6 Mees. & Welsb. 358, there was a difference of opinion among the judges. This was a question as to whether a misrepresentation as to certain leased premises, which was made by an agent innocently, while his principal knew that the representation was false, would avoid the lease. Mr. Baron Parke (with whom were the majority of the court) held that it would not; he said: "It is, I think, justly said, that it is not enough to support the plea that the representation is untrue; it must

that a contract will be invalidated by any misrepresentation made either with intent to defraud, or with knowledge of its

be proved to have been fraudulently made. As this representation is not embodied in the contract itself, the contract cannot be affected, unless it be a fraudulent representation, and that is the principle on which the plea is founded. Now the *simple* facts, that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute a fraud; each person is innocent, because the plaintiff makes no false representation, and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition that if each be innocent, the act of either or both can be fraud." Lord Abinger, on the contrary, said, after citing the cases of *Williamson v. Allison*, 2 East, R. 446, and *Hodgson v. Richardson*, 1 Wm. Black. R. 463, "Nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud. But though I consider this case as coming fully within the meaning of a legal fraud, even if the agent is presumed to be ignorant of the falsehood of his misrepresentation, I am very far from conceding that it is a case void of all moral turpitude." In *Smout v. Ilbery*, 10 Mees. & Welsb. 1, the same court held a different doctrine, and agreed with Lord Abinger. In this case Baron Alderson said: "There is a third class, in which the courts have held that where a party making the contract as agent *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, *it is true the agent is not actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before.* It is a wrong, differing only in degree, *but not in its essence*, from the former case, to state as true what the individual making such statement does not know to be true, *even though he does not know it to be false*, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertions, it is equally just that he who makes such assertion should be personally liable for its consequences." So also in *Railton v. Matthews*, 10 Clarke & Finell. 934, the same doctrine was asserted on appeal to the House of Lords. This was a case where the respondents, though cognizant of certain material facts affecting an agent's credit, had not communicated them to the plaintiff, who became his cosurety on a bond to the respondents; and in the course of the judgment Lord Cottenham said: "In my opinion there may be a case of improper concealment or non-communication

falsity; but whether an action will lie for a misrepresentation mistakenly made and without intention to defraud, but never-

of facts, which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional and with a view to the advantage the parties were to receive." This doctrine was again reversed in *Moens v. Heyworth*, 10 Mees. & Welsb. 147, and in *Taylor v. Ashton*, 11 Mees. & Welsb. 401, and the rule was stated, "That independently of any contract between the parties, no one can be made responsible for a misrepresentation of this kind, (namely, that a certain banking company was in a prosperous condition.) unless it be fraudulently made." The doctrine of *Snout v. Ilbery* is, that there is liability for a misrepresentation, without moral fraud. In *Taylor v. Ashton* it is asserted, that there must be knowledge that the misrepresentation is false, or in other words, moral fraud. In *Polhill v. Walter*, 3 Barn. & Adolph. 114, a middle ground was taken. The court thought that "corrupt motive" was not necessary, but a statement known to be untrue, though uttered with no intention to defraud, was sufficient to invalidate a contract. "If the defendant," Lord Tenterden says, "had good reason to believe his representation to be true, he would have incurred no liability, for he would have made no statement which he knew to be false; a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive." But the misrepresentation in this case was by the defendant that he had authority to pass a bill, in consequence of which it was accepted, and as the court say, "he no doubt believed the acceptance would be ratified," but he should have "done no more than make a statement of that belief." There was, therefore, scarcely an intentional falsehood, and certainly not a corrupt motive. Yet the contract was held to be invalidated thereby. See also *Foster v. Charles*, 6 Bing. R. 396; s. c. 7 Bing. R. 105, in which Tindal, C. J., said: "It is fraud in law if a party make representations which he *knows to be false* and injury ensues, although the motives from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences." The knowledge of the party making a representation that it is false is admitted to be necessary in *Freeman v. Baker*, 5 Barn. & Adolph. 806. In *Evans v. Collins*, 5 Q. B. 804, the sheriff brought an action against an attorney for false representation as to the identity of a person to be taken in execution by him, in consequence of which, he arrested the wrong person, and was forced to pay damages, and the defendants pleaded that they had reason to believe their representation to be true, and made it in good faith; and the jury found for the defendants on the issue joined on this plea. Lord Denman, however, gave judgment for the plaintiff, notwithstanding the verdict, and said: "One of two persons has suffered by the conduct of the other.

theless completely false, is rendered doubtful by the late cases. But in all cases of this kind, where the misrepresentation is

The sufferer is wholly free from blame; but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation, that the defendant knew his representation to be false is, therefore, immaterial." This judgment, however, was overruled by the Court of Exchequer, (*Collins v. Evans*, 5 Q. B. 820,) on the ground that there was no fraud, and that the representation was honestly made. See also *Fuller v. Wilson*, 3 Adolph. & Ell. (N. S.) 58, in which Lord Denman had previously asserted the same doctrine — which had been also overruled, in error on other points, by the Court of Exchequer in *Wilson v. Fuller*, 3 Adolph. & Ell. (N. S.) 68. See Lord Denman's remarks in *Barley v. Walford*, 9 Q. B. R. 206. In *Rawlings v. Bell*, 1 C. B. 959, Tindal, C. J., said: "On the part of the plaintiff it was contended, that the falsehood of the statement was sufficient to support an action, although it was made without any intention to mislead, and without any knowledge of its falsehood. But it seems to us that a statement false in fact, but not false to the knowledge of the party making it — as in *Polhill v. Walter*, 3 Barn. & Adol. 114 — nor made with any intention to deceive, will not support an action, unless from the nature of the dealing between the parties, a contract to indemnify can be implied.

"In this case, the right to maintain the action rests upon the alleged assertion by the wife that she had a right to distrain. But there could be no retainer of the plaintiff to distrain given by wife, nor any contract *by her* to indemnify him. Her representation, therefore, being made honestly, and without knowledge of its falsehood, was not sufficient to give a right of action." Again, the late case of *Ormrod v. Huth*, 14 Mees. & Welsb. 651, which was an action on the case against the defendants, who were dealers in cotton, for fraud, in representing certain samples as fair, which were not, the court said: "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration,) he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the *representation was false to the knowledge of the party making it*, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, although not true in point of fact, we think this does not amount to fraud in law; but that the rule of *caveat*

purely accidental and without fraudulent design, it is not necessary to consider it to be a fraud, since if it be made by

emptor applies, and the representation itself does not furnish a ground of action; and although the cases may in appearance raise some difficulty as to the effect of a false assertion or representation of title in the seller, yet it will be found on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller. The rule we have drawn from the cases appears to us to be supported so clearly by the early as well as the most recent decisions, that we think it unnecessary to bring them forward in review, satisfying ourselves by saying that the exception must be disallowed, and the judgment of the Court of Exchequer affirmed." In these two last cases it will be perceived that the representation was merely of opinion, and one was a sale where the doctrine of *caveat emptor* applied, and the party had no legal right to rely on the statement. In *Thom v. Bigland*, 20 Eng. Law & Eq. R. 470, which was an action on a contract of sale, in which fraudulent misrepresentation was alleged, Baron Parke said: "The law is perfectly settled, that, independently of duty, no action will lie for a false misrepresentation unless it is made by a person knowing it to be untrue, or with a fraudulent intention to induce another to act on the faith of, and alter his position to his damage. The law is so settled by *Collins v. Evans*, and *Ormrod v. Huth*, 14 Mees. & Welsb. 651. Was then this statement by the defendant false and fraudulent within this description? I see no fraud at all. The account he gave is true so far as it goes, but it omits a part. It is merely inaccurate." The question in this case, it will be observed, arose upon a contract of sale, in respect to which the doctrine of *caveat emptor* applies. Mr. Justice Story, however, in his Commentaries on Equity says: "Whether the party thus misrepresenting a material fact, knew it to be false, or made the assertion without knowing, whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable, as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive; for it operates as a surprise and imposition upon the other party." See also *Doggett v. Emerson*, 3 Story, R. 732, and *Hough v. Richardson*, 3 Story, R. 690, in which Mr. Justice Story affirmed the same doctrine. See also *Daniel v. Mitchell*, 1 Story, R. 172; *Attwood v. Small*, 6 Clark & Finel. 232; *Farnam v. Brooks*, 9 Pick. R. 213; *Ainslie v. Medlycott*, 9 Ves. 21; *Graves v. White*, 2 Freem. R. 57; *Pearson v. Morgan*, 2 Bro. Ch. R. 389; *Burrowes v. Lock*, 10 Ves. 475; *De Manneville v. Crompton*, 1 Ves. & Beam. 351; 1 Marsh. on Ins. B. 1, ch. 10, § 1; *Ex parte Carr*, 3 Ves. & B. 111; *McFerran v. Taylor*, 3 Cranch. R. 270; *Rosevelt v. Fulton*, 2 Cow. R. 134; 1 Story, Eq. Jurisp. § 193. In *Tryon v. Whitmarsh*, 1 Metcalf, 1, 9, in an action for a deceitful representation that a per-

mistake, it would avoid the contract, if it should touch its essence, on the ground of a want of mutual assent of the

son was entitled to credit, it was held, that it must be proved that the defendant did not believe his representation to be true, and the question whether he made his statement *bonâ fide* was for the jury. This, however, was from the nature of the case a mere statement of opinion. In *Lobdell v. Baker*, 1 Metcalf, R. 201, the rule is clearly laid down by Mr. Justice Wilde, "Where a party affirms either that which he knows to be false, or *does not know to be true* to another's loss and his own gain, he is responsible in damages for the injury occasioned by such falsehood. This is a very just and reasonable principle, and is well established." This case was reaffirmed in 3 Metcalf, R. 469. In *Stone v. Denny*, 4 Metcalf, R. 160, this case is again commented on by the court, and it is said that "fraud will be *inferred* when the party makes a representation which he knows to be false, or *as to which he has no knowledge or information*, and no grounds for expressing his belief, and in such cases the party would be held liable for his false representation," and the ruling of the Chief Justice in a previous trial was supported, namely, "that an unqualified acknowledgment, as if his own knowledge of the correctness of the schedule, made by the defendant, he not knowing whether it was correct, with a view to induce the plaintiff to make the purchase, if it prove false, was a fraud which would render the defendant liable." In *Mason v. Crosby*, 1 Woodbury & Minot, 353, which was a bill in equity claiming relief on account of fraud in the sale of real estate, Mr. Justice Woodbury says: "Nor is it material in this case whether or not either of the respondents or their agent knew to be false, what was stated by any of them, provided he did state what was not true, and it was to a material point and was relied on. A vendor in cases like this is not in his own person or by others to throw firebrands, and say he is in sport, or make material statements which are untrue, and excuse himself by his own ignorance." The same doctrine is laid down in *Smith v. Babcock*, 2 Woodbury & Minot, 260; and *Doggett v. Emerson*, 1 Woodbury & Minot, 205; *Buford v. Caldwell*, 3 Missouri R. 335; *Snyder v. Findley*, 1 Cox (N. J.) 48, 78. In *McFerran v. Taylor*, 3 Cranch, R. 280, Mr. Chief Justice Marshall says: "That this misrepresentation is material, cannot be denied; but it is contended by the defendant, that it originated in mistake, not in fraud; and as the country was at that time unknown to both the contracting parties, and the material object was to give the purchaser a right to take the land he had purchased out of the tract already located for the seller, and accidental error in the description of the place where the tract in contemplation of the parties lay, an error which could have had, at the time, no influence on the contract, ought not now to affect the person who has innocently committed it.

"From the situation of the parties and of the country, and from the form of the entry, it is reasonable to presume that this apology is true in point of

parties.¹ For if a gross misrepresentation be made as to a material fact, it matters not whether it be treated as a constructive fraud, or as a mere mistake, the right of the party deceived to avoid it is the same.²

fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance." In *Russell v. Clark's Ex'rs*, 7 Cranch, R. 69, where a general letter of recommendation was written, it is held that if a representation concerning the credit of another, be honestly made, its falsity does not render the person making it liable to an action; and the ground upon which the decision is put, is that such representations are necessarily matters of *opinion*, given as such and received as such. The same doctrine is held in *Lord v. Goddard*, 13 Howard, S. C. R. 198, 210, in a similar case, where a commercial letter of recommendation was written, on faith of which credit was given and a loss sustained. In *Hammatt v. Emerson*, 27 Maine R. 326, it was held, that in a contract of sale, a misrepresentation must have been known to be false, to avoid the contract, and that fraudulent intent must appear, but the court say, "When one has made a representation positively, or professing to speak as of his own knowledge without having any knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred." A similar rule was laid down in *McDonald v. Trafton*, 15 Maine R. 225; and *Ingersoll v. Barker*, 21 Maine R. 474. See also *Allen v. Addington*, 7 Wend. R. 1; *Young v. Covill*, 8 Johns. R. 25; *Weeks v. Burton*, 7 Verm. R. 67; *Ewins v. Calhoun*, Ibid. 79; *Lord v. Colley*, 6 N. Hamp. R. 99. See also *Boyd v. Browne*, 6 Barr, R. 316; *Hopper v. Sisk*, 1 Smith, R. 102; and see to the point that where material facts are falsely stated by a person as of his knowledge and not of his opinion only, he is liable therefor; *Hazard v. Irwin*, 18 Pick. R. 96; *Stone v. Denny*, 4 Metcalf, R. 160; *Doggett v. Emerson*, 3 Story, R. 732; 1 Wood. & Minot, 205; *Lobdell v. Baker*, 1 Metcalf, R. 193; *Gough v. St. Johns*, 16 Wend. R. 646; *Thomas v. McCann*, 4 B. Monr. R. 601; *Munroe v. Pritchett*, 16 Alab. R. 785; *Joice v. Taylor*, 6 Gill & Johns. 51; *McCormick v. Malin*, 5 Blackf. R. 509; *Lockridge v. Foster*, 4 Scam. R. 570.

¹ Ante, § 104; *Flight v. Booth*, 1 Bing. N. C. 377; *Farnam v. Brooks*, 9 Pick. R. 233; *McFerran v. Taylor*, 3 Cranch, R. 270; *Daniel v. Mitchell*, 1 Story, R. 193; *Hough v. Richardson*, 3 Story, R. 691; *Warner v. Daniels*, 1 Woodbury & Minot, 91.

² *Doggett v. Emerson*, 3 Story R. 733. This was a bill in equity to set aside a purchase of land, made upon gross misrepresentation as to the kind

§ 507. The misrepresentation must, however, be in regard to some material fact, operating as an inducement or consideration to the contract. Thus, if a party should offer an estate for sale, representing at the time, that it contained a valuable mine, and thereupon, induced by this fact, some person should buy the land, and the representation should prove false, the contract for the sale, or the sale itself, if completed, would be avoided for fraud; for the misrepresentation touches the very essence of the contract.¹ So, also, if a person in the sale of a vessel should falsely represent her to be copper-fastened; or to be newly rigged; or to have been built within a year, the vendee would not be bound by the contract.² So, also, false representations, that a steam-engine was of twenty-horse power, and fit for mining purposes, that it was free from rust, and was in good order, and had been so certified to be by engineers, would be sufficient to vitiate a contract of sale made on the

and quality of timber contained thereon. Mr. Justice Story said: "Upon the first question, it does not appear to me that there is any reasonable ground to doubt that the purchase of the plaintiff was made upon an entire credit given to the representations of Williams of the quantity and quality of the timber on the township. The plaintiff resided in Boston, and, confessedly, had no knowledge of timber lands, and had never seen the township. He must, therefore, have placed implicit reliance upon the statements of Williams. Now it is not quite immaterial, in a case of this sort, whether Williams was himself at once the deceiver and the deceived. The question is not, whether he acted basely and falsely; but whether the plaintiff purchased upon the faith of the truth of his representations. If the plaintiff did so purchase, then, upon the settled principles of courts of equity, the bargain ought to be set aside as founded upon gross misrepresentation and gross mistake, going to its very essence and objects. The whole doctrine turns upon this, that he, who misleads the confidence of another by false statements in the substance of a purchase shall be the sufferer, and not his victim." See also *Smith v. Babcock*, 2 Woodbury & Minot, 246; *McFerran v. Taylor*, 3 Cranch, R. 270; *Buford v. Caldwell*, 3 Missouri R. 335; *Munroe v. Pritchett*, 16 Ala. R. 785; *Collins v. Denison*, 12 Met. 549.

¹ *Lowndes v. Lane*, 2 Cox, R. 363; *Daniel v. Mitchell*, 1 Story, R. 172; 1 Domat, B. 1, tit. 2, § 11, art. 12; Dig. Lib. 18, tit. 1, C. 54; *Jarvis v. Duke*, 1 Vern. 19; 1 Story, Eq. § 196.

² *Lowndes v. Lane*, 2 Cox, R. 363; *Shepherd v. Kain*, 5 Barn. & Ald. 240; *Fletcher v. Bowsher*, 2 Stark. R. 561.

basis thereof, because the misrepresentations are vital thereto.¹ So, also, where, in the treaty for the purchase of a house, the defendant affirmed that the rent was £30 per annum, when it was only £20, it was held, that the falsity of the statement vitiated the contract.² But if the misrepresentation be in respect to an immaterial fact, which, if known to the purchaser, would not have affected his decision, it affords no ground to set aside the contract.³ Falsity, alone, is not a sufficient ground to avoid a contract, but it must work an injury;⁴ or as it has been expressed, "fraud without damage or damage without fraud, gives no cause of action, but where these two occur and meet together, there an action lieth."⁵ The question, however, whether a representation is or is not material in a given case, is for the determination of a jury.⁶

§ 508. Yet in all cases of misrepresentation, it is requisite that the party claiming to set aside the contract, should actually have been deceived by it, to his injury; for if he knew the statement to be false at the time when it was made, it could not have influenced his decision, and the reason, for which such contracts are treated as void, falls to the ground. So, also, if the representation be productive of no injurious results, its mere falsity constitutes no reason for setting the contract aside, for a mere intention to defraud, not carried into effect,

¹ *Hazard v. Irwin*, 18 Pick. R. 95.

² *Risney v. Selby*, Salk. 211.

³ 1 Story, Eq. Jurisp. § 190; *Morris Canal Co. v. Emmett*, 9 Paige, R. 168; *Stebbins v. Eddy*, 4 Mason, 414; *Winch v. Winchester*, 1 Ves. & Beam. 375; *Geddes v. Pennington*, 5 Dow, 159; *Camp v. Pulver*, 5 Barb. 91; *Green v. Gosden*, 4 Scott, N. R. 13; 3 M. & G. 446; *Vane v. Cobbold*, 1 Exch. R. 798.

⁴ *Fellowes v. Lord Gwydyr*, 1 Russ. & Mylne, R. 83; *Foster v. Charles*, 6 Bing. R. 396; s. c. 7 Bing. R. 105; *Vernon v. Keys*, 12 East, R. 637; 2 Kent, Comm. Lect. 39, p. 490.

⁵ *Croke, J.*, 3 Bulst. R. 95.

⁶ *Lindenau v. Desborough*, 8 Barn. & Cres. 586; *Westbury v. Aberdeen*, 2 Mees. & Welsb. 267.

will not vitiate a contract.¹ If, therefore, a person should represent cloth to be blue, and the buyer should see that it is murrey; or should represent a house to be in good order, and the lessee should see that several windows are broken out; he could not be bound to make good such representation, simply because it could not have deceived the party to whom it was made. But if it actually operate as a deception, — as if the person to whom such a statement is made should be blind, or should actually not perceive the statement to be false, — it will be a fraud.

§ 509. Again, every actual misrepresentation, which is material, is a fraud, although it be apparently true. Thus, if words be used in a double sense, — as if articles be represented to be silver, when they are German silver, and be purchased in the belief that they are Mexican silver, — the contract would be void. So, also, where artifice is employed for the purpose of deception, or where a trick is played, by which a person is deceived into making a contract, wholly different from what he intended, the fraud and surprise would vitiate it. Thus, where A. agreed to buy a horse, and to give a barleycorn for the first nail, and to double it for every nail in the horse's shoes, and an action was brought for the price, it was held that a bargain in such terms was void.² So, also, where the defendant, being about to furnish the plaintiff's son with goods on credit, inquired of the defendant by letter, whether his son had, as he asserted, £300 of his own property, and the defendant answered that he had, — the fact being that he had lent his son £300 on his promissory note, payable with interest, on demand, — and the son afterwards became insol-

¹ *Foster v. Charles*, 6 Bing. 396; 7 *Ibid.* 105; 2 Kent, Comm. Lect. 39, p. 490; *Pothier de Vente*, n. 210; *Vernon v. Keys*, 12 East, 637, 638; 1 Story, Eq. Jur. § 202, 203.

² *James v. Morgan*, 1 Lev. R. 111. See also *Smith on Contracts*, p. 99, and the remarks on the case of *Thornborow v. Whitacre*, 2 Ld. Raym. R. 1165.

vent, it was held that this was a misrepresentation, for which the defendant was liable in damage to the plaintiff.¹

§ 510. Yet, though the representation be even wilfully false, in order to found a right, in the party to whom it is made, to avoid it, it should be of such a nature that he had a clear right to rely upon it, as an actual and undisputed fact; for if he had not, it was his own folly and indiscretion to trust to a statement, made under no legal obligation or pledge for its accuracy; and the policy of the law, which encourages vigilance and caution, will not assist him.² The question therefore arises, what representations made by one party has the other a right to rely upon. And here the great distinction is between representations as to matters-of-fact, and as to matters of opinion or judgment. Every misrepresentation of a material fact is fraudulent in law, if the party to whom it was made did not have equal means of knowing or ascertaining its falsity; or if it be made in such a manner as to induce him to forbear making any inquiries in respect to it.³ ¹⁴ Thus in the case of sales of personal property, the rule of *caveat emptor* generally obtains, by which every purchaser, who makes a naked contract of sale without either an express or implied warranty, is understood to depend solely on his own judgment; since, if he do not choose to rely on his own skill and judgment, he may require a warranty, or so frame his contract by embodying any representation therein, as to render the seller

¹ *Corbett v. Brown*, 8 Bing. R. 35; s. c. 1 Moore & Scott, 86; 5 Car. & Payne, 365.

² *Trower v. Newcome*, 3 Meriv. 704; *Scott v. Hanson*, 1 Simons, R. 13; *Fenton v. Browne*, 14 Ves. 144; 2 Kent, Comm. Lect. 39, p. 484, 485, 486, 487, 4th edit.; *Davis v. Meeker*, 5 Johns. 354; *Harvey v. Young*, Yelv. 21; 1 Story, Eq. Jurisp. § 199; *Taylor v. Fleet*, 1 Barbour, S. C. R. 474.

³ *Vernon v. Keys*, 12 East, R. 637; *Hazard v. Irwin*, 18 Pick. R. 95; *Atwood v. Small*, 6 Clark & Finell. 232; *Hough v. Richardson*, 3 Story, R. 690; *Smout v. Ilbery*, 10 Mees. & Welsb. 1; *Illycraft v. Creasy*, 2 East, R. 92.

responsible.¹ Yet, if the seller make material misrepresentations, on faith of which the purchase is made, the law will not only not enforce the sale, in case the seller was guilty of wilful falsehood; but will create an implied warranty on his part, that such statement is true, although it be neither embodied in the contract, nor made with fraudulent intent, provided it be in respect to a matter stated as *a fact*, of which the other has not equal means of knowledge with him.² Thus, if the seller be a producer or manufacturer, and state that goods are of a certain quality, the law imports a warranty that such representation is true, because, from his position, he has, or necessarily ought to have more knowledge in respect of them than the buyer.³ But if a purchaser, choosing to judge for himself, do not avail himself of the knowledge or means of knowledge open to him or his agents, he cannot claim to set the contract aside, on the ground that statements false in fact were made to him; for the rule of *caveat emptor* applies, and he must also prove that they were fraudulently intended.⁴ Again, if the means of knowledge be within the reach of the purchaser, and he is nevertheless induced to forbear to employ them, by the statement of the seller, the contract would be voidable.⁵ The ground upon which all these doctrines proceed, is, that, ordina-

¹ *Ormrod v. Huth*, 14 Mees. & Welsb. 651.

² *Schneider v. Heath*, 3 Camp. R. 506; *Baglehole v. Walters*, 3 Camp. R. 154; *Mellish v. Motteux*, Peake's Cas. 115; *Bywater v. Richardson*, 1 Adolph. & Ell. 508; 2 Kent, Comm. Lect. 39, p. 490; *Jones v. Bright*, 5 Bing. R. 533; *Brown v. Edgington*, 2 Mann. & Grang. 290; *Story on Sales*; *Smith v. Babcock*, 2 Woodbury & Minot, 246.

³ *Ibid.*; *Jones v. Bright*, 5 Bing. R. 533; *Brown v. Edgington*, 2 Mann. & Grang. 290.

⁴ *Pasley v. Freeman*, 3 T. R. 57; *Attwood v. Small*, 6 Clark & Finell. 232; *Hough v. Richardson*, 3 Story, R. 690; *Baglehole v. Walters*, 3 Camp. R. 154; *Schneider v. Heath*, 3 Camp. R. 506; *Bluett v. Osborne*, 1 Stark. N. P. C. 384; *Mason v. Crosby*, 1 Woodbury & Minot, 342.

⁵ *Ibid.*; *Vernon v. Keys*, 12 East, R. 637; *Atwood v. Small*, 6 Clark & Finell. 232; *Taylor v. Fleet*, 1 Barbour, S. C. R. 474; *Smith v. Babcock*, 2 Woodbury & Minot, 296; *Tuthill v. Babcock*, *Ibid.* 298; *Mason v. Crosby*, 1 Woodbury & Minot, 342.

rily, a man relies upon his own judgment and skill in making a purchase. But if he actually repose confidence in the statements of the vendor as to matters-of-fact material to the bargain, whether he be compelled to do so through the necessities of the case, — as when he has not the means of knowledge, — or be persuaded to do so by the seller, the reason for the rule fails, and an exception is, therefore, admitted.¹ But if he have the means of knowledge, and do not choose to use them, he has himself only to blame for trusting implicitly to statements which the seller honestly makes. Of course, if the seller fraudulently misrepresent facts, or state facts to exist, which he knows not to exist, his fraud would vitiate the contract, provided the misstatements were in respect to a material point.²

§ 511. But where a statement is not made of a fact, but only as an *opinion*, the rule is quite different. Ordinarily, a naked statement of opinion is not a representation, on which a buyer is legally entitled to rely,³ unless perhaps in some special cases, where peculiar confidence or trust is created between the parties. The ground of this rule is probably the impracticability of attempting to discover by means of the rules of law, the real opinion of the party making the representation, and also, because a mere expression of opinion does not alter facts, though it may bias the judgment. Mere

¹ Warner v. Daniels, 1 Woodbury & Minot, C. C. R. 90; Taylor v. Fleet, 1 Barbour, S. C. R. 473; Collins v. Denison, 12 Metcalf, R. 549; Tuthill v. Babcock, 2 Woodbury & Minot, 298.

² 1 Story, Eq. Jurisp. § 197; 1 Marshall on Ins. B. 1, ch. 10, § 2, p. 473; 1 Domat, B. 1, tit. 2, § 11, art. 3, 11, 12. See also 2 Kent, Comm. Lect. 39, p. 484, 485; Taylor v. Ashton, 11 Mees. & Welsb. 401; Cornfoot v. Fowke, 6 Mees. & Welsb. 358. See ante, § 506, note; Ormrod v. Huth, 14 Mees. & Welsb. 651; Hazard v. Irwin, 18 Pick. R. 105; Doggett v. Emerson, 3 Story, R. 733.

³ Hazard v. Irwin, 18 Pick. R. 105; Collins v. Evans, 5 Adolph. & Ell. (N. S.) 804, 820; Stebbins v. Eddy, 4 Mason, R. 414; Taylor v. Ashton, 11 Mees. & Welsb. 401; Moens v. Heyworth, 10 Mees. & Welsb. 147; Trower v. Newcombe, 3 Meriv. R. 704; Scott v. Hanson, 1 Sim. R. 13; Fenton v. Brown, 14 Ves. jr. R. 144; Davis v. Meeker, 5 Johns. R. 354.

expressions of opinion are not, therefore, considered so tangible a fraud as to form a ground of avoidance of a contract, even though they be falsely stated.¹ Thus, the common language of puffing and commendation, and the statements made at auction sales, where the article sold is equally open to the observation of both parties, though false in fact, and bad in morals, are not treated as frauds. But it would be otherwise, if the character and quality of the commodity be disguised or concealed, so as to deceive and impose upon the buyer; or if the value be enhanced by improper means, as if puffers and by-bidders be employed at auction sales.² *A fortiori*, if an honest opinion be given as to the value of property sold, it will not afford a good ground to invalidate a contract, however ill-founded it may be.³ Yet, where a representation is made going to the essence of a contract, the party making it should be careful to state it as an opinion, and not as a fact of which he has knowledge, or he may be liable thereon. The question whether a statement was intended to be given as an opinion, and was so received, is, however, one for a jury to determine, upon the peculiar circumstances of the case.⁴ But whenever a belief is asserted in a fact which is material or essential, and

¹ Ibid.

² 2 Kent, Comm. Lect. 39, p. 482, 483, 484, 4th ed.; *Turner v. Harvey*, 1 Jac. R. 178; 1 Story, Eq. Jur. § 201; Dig. Lib. 18, tit. 1, c. 43; *Bramley v. Alt*, 3 Ves. 624; *Smith v. Clarke*, 12 Ves. 483; *Twining v. Momice*, 2 Bro. Ch. R. 330; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note c; *Pickering v. Dowson*, 4 Taunt. 785; *Marquis of Townshend v. Stangroom*, 6 Ves. 338; *Bexwell v. Christie*, Cowp. 395. See also *Ward v. Center*, 3 Johns. 271; *Upton v. Vail*, 6 Johns. 181; *Russell v. Clark*, 7 Cranch, 92; *Adams v. Paige*, 7 Pick. 542; *Pierce v. Jackson*, 6 Mass. 242; *Moore v. Tracy*, 7 Wend. 229; *Whittier v. Smith*, 11 Mass. 211.

³ 1 Story, Eq. Jurisp. § 197; *Hepburn v. Dunlop*, 1 Wheat. 189; 2 Kent, Comm. Lect. 39, p. 485; *Vernon v. Keys*, 12 East, 632; *Harvey v. Young*, Yelv. R. 21; *Jendwine v. Slade*; 2 Esp. R. 572.

⁴ *Lomi v. Tucker*, 4 Car. & Payne, 15; *Power v. Barham*, 4 Adolph. & Ell. 473; *Hill v. Gray*, 1 Stark. R. 434; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343; *Hazard v. Irwin*, 18 Pick. R. 95; *Foster v. Caldwell*, 18 Verm. 176.

which the person asserting knows to be false, and the statement is made with an intention to mislead, it is fraudulent, and affords a ground of relief. Thus, where the vendor of a note asserted, that he believed the maker to be responsible, when he knew he was not, and the vendee acted upon his representation of belief, it was held to be equivalent to an assertion that the maker was responsible.¹

§ 512. But there may be cases when especial confidence is reposed in the opinion of a party who is an expert, and who knows that his judgment is relied upon, wherein a false statement of opinion, artfully made, for the purpose of misleading the other party, might furnish sufficient ground to avoid a contract made on faith thereof.² Thus, if a man of skill and judgment in pictures, knowing that his judgment was depended upon, should represent a particular painting to be the work of one of the old masters, or should even falsely state that such was his opinion, with an intent to deceive the purchaser, and the latter should be induced by such statement to purchase the picture, the sale would probably be held to be void.³ But these cases are peculiar in their circumstances, and form an exception to the general rule.

¹ *Foster v. Swasey*, 2 Woodbury & Minot, 217. See also *Stebbins v. Eddy*, 4 Mason, R. 414.

² 1 Story, Eq. Jurisp. § 198; 1 Pothier on Oblig. n. 17 to 20 and note A; Pothier de Vente, n. 233 to 241; *Hill v. Gray*, 1 Stark. 434; explained in *Keates v. Cadogan*, 2 Eng. Law & Eq. R. 318; 2 Kent, Comm. Lect. 39, p. 482, 4th ed.; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Pidcock v. Bishop*, 3 Barn. & Cres. 605; *Baglehole v. Walters*, 3 Camp. R. 154; *Schneider v. Heath*, 3 Camp. 506; *Pickering v. Dowson*, 4 Taunt. 779, 784; *Cornfoot v. Fowke*, 6 Mees. & Welsb. 359, 383; *Wright v. Crookes*, 1 Scott, New Cases, 685; *Laidlaw v. Organ*, 2 Wheat. 178, 195; *Mellish v. Motteux*, Peake's Cases, 115; *Arnot v. Biscoc*, 1 Ves. 96; 2 Kent, Comm. Lect. 39, p. 482-884, 4th ed. and note, *ibid*.

³ 2 Kent, Comm. Lect. 39, p. 482, 4th ed.; 1 Story, Eq. Jurisp. § 198; *Hill v. Gray*, 1 Starkie, R. 434; *Pilmore v. Hood*, 5 Bing. N. C. 97.

§ 513. Where a misrepresentation is embodied in a contract, the general rule is, that it will avoid the contract, if it be in a vital point. But this rule is subject to the same modification as to misstatements of matter-of-fact, and as to matters of opinion. If the misstatement be in respect to a matter purely of opinion, it will not avoid the contract, and this question is for the decision of the jury.¹ Thus, where words of description are contained in a bill of parcels, or memorandum of sale, and the subject-matter does not answer to them, if they be stated expressly as opinion,² or if they relate to a matter, in respect to which, from its nature, only an opinion can be formed, their mere falsity will not vitiate the contract.³ Thus, where a bill of parcels described certain pictures which were sold, to be "Four pictures, views in Venice, Canaletto," it was held, that it was properly left to the jury to say whether this was intended as an expression of opinion or not; since upon such fact depended the liability of the seller.⁴ But if the description be in respect to a matter-of-

¹ *Power v. Barham*, 4 Adolph. & Ell. 476; *Jendwine v. Slade*, 2 Esp. R. 573.

² *Dunlop v. Waugh*, Peake, R. 123.

³ See Story on Sales, § 358, and cases cited.

⁴ *Power v. Barham*, 6 Nev. & Man. 62; s. c. 7 Car. & Payne, 356; 4 Adolph. & Ell. 476. In *Jendwine v. Slade*, 2 Esp. R. 573, Lord Kenyon said, "It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase." In *Power v. Barham*, Lord Denman, in commenting on the case of *Jendwine v. Slade*, said, "I think that the case was correctly left to the jury. We must take the learned judge to have stated to them that the language of Lord Kenyon in *Jendwine v. Slade*, was merely the intimation of his opinion

fact, relating to the identity or quality of the subject of sale, which is susceptible of accurate knowledge, and especially, if it be in respect to a fact, which the seller is bound to know, its falsity would vitiate the contract, if it were material; for, in such a case it would be considered as an express warranty.¹ Within this last branch of the rule, nearly all the cases of sales come; and where a fact is stated expressly in a contract, it must be clearly shown to be given and received as an opinion, or it will invalidate the contract.² Thus, where a sale note

upon such a contract as was then before him. It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord Kenyon in the case referred to. But the case here is, that pictures are sold with a bill of parcels, containing the words 'Four pictures, Views in Venice, Canaletto.' Now, words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all these circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or expression of opinion. I think that their finding was right; Canaletti is not a very old painter. But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence." See also *Loni v. Tucker*, 4 Car. & Payne, 15; *Hill v. Gray*, 1 Stark. R. 434; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343; *Hough v. Richardson*, 3 Story, R. 690.

¹ *Winsor v. Lombard*, 18 Pick. R. 60; *Shepherd v. Kain*, 5 Barn. & Ald. 240; *Hastings v. Lovering*, 2 Pick. R. 214; *Henshaw v. Robins*, 9 Met. 83; *Hazard v. Irwin*, 18 Pick. R. 95; *Budd v. Fairmaner*, 8 Bing. R. 51.

² *Doggett v. Emerson*, 3 Story, R. 732. In this case Mr. Justice Story said, "It appears to me that it is high time, that the principles of courts of equity upon the subject of sales and purchases should be better understood, and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing, and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberima fides*, in every representation made by him as an inducement to the sale. He should, literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial, whether the representation be wilfully and designedly false, or igno-

was given in these words, "Sold 2,000 gallons prime quality winter oil," it was held, that, this being a misrepresentation as to a matter-of-fact, of the truth of which the seller might easily inform himself, it constituted a warranty which he was bound to make good.¹

§ 514. If, however, the bill of parcels or memorandum of sale in which the subject-matter is described, also contain an express warranty as to particular qualities, and the warranty does not fail, the buyer must show that the description was false within the knowledge of the seller, to entitle him to recover. For an express warranty as to particular facts or qualities is considered as an implied exclusion of warranty as to every other fact or quality; according to the maxim, "*Expressio unius est exclusio alterius*."² Thus, where a receipt was given in the following words, "Rec'd. of A. D., £10 for a gray four-year old colt, warranted sound," and the colt proved to be sound, but more than four years old, it was held, that the buyer could not recover for such falsity of description, without showing that the seller wilfully misled him, since the description was evidently intended as identification.³ But

rantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain. And I cannot but believe, if this doctrine of law had been steadfastly kept in view, and fairly upheld by public opinion, the various speculations, which have been so sad a reproach to our country, would have been greatly averted, if not entirely suppressed, by its salutary operation."

¹ Winsor v. Lombard, 18 Pick. R. 60. See Fraley v. Bispham, 10 Barr, 320; Richmond v. Farquar, 8 Blackf. 89; Osgood v. Lewis, 2 H. & G. 495; Lamb v. Crafts, 12 Met. 353; Wason v. Rowe, 16 Verm. 527.

² Budd v. Fairmaner, 8 Bing. R. 51; Richardson v. Browne, 1 Bing. R. 344.

³ Budd v. Fairmaner, 8 Bing. R. 51. In this case Tindal, Ch. J. said, "A written instrument was produced by the plaintiff to show the nature of the contract between him and the defendant, and we are to interpret that instrument like all others, according to the intention of the parties. The instru-

where the memorandum, or receipt, or bill of parcels contains no express warranty, the description itself creates an implied

ment appears to be a receipt for £10, for a 'gray four-year old colt, warranted sound.' I should say that, upon the face of this instrument, the intention of the parties was to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to show that the article is not according to the warranty; whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the *scienter*, and show that the description was false within the knowledge of the seller. And where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable. Therefore, in *Parkinson v. Lee*, 2 East, R. 313, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held that the seller was not responsible for a latent defect, unknown to him, but arising from the fraud of the grower from whom he purchased. A party who makes a simple representation stands, therefore, in a very different situation from a party who gives a warranty. And if so, how can I say that this distinction was not present to the mind of the defendant in this case? When he sells a gray four-year old colt, warranted sound, he means to say that he will be responsible for the soundness, but that the rest is only matter of representation, for which he will not be answerable, unless it be shown to be false within his knowledge. Many cases have been referred to, and some stress has been laid on the effect of the word *dedi* when contained in a grant; but, according to Lord Eldon, in *Browning v. Wright*, 2 B. & P. 21, words of that nature 'import a contract in law, the effect and meaning of which would be affected by the subsequent words of the indenture;' and in the cases relied on for the plaintiff, the sellers had delivered commodities essentially different from those which they had professed to sell." It will be observed, that this case is purely one of interpretation, and the doctrine as to description would seem to be intended to be confined to cases where there is a distinction made by the parties between the description and the warranty, like that, which was before the Court. The ground of the Court will be more evident from the opinions of Mr. Justice Bosanquet and Mr. Justice Alderson, who both treat the case as proceeding upon a manifest intention on the part of the vendor, as expressed in the memorandum, to distinguish between what he was willing to warrant, and what was mere description. The former says: "In every case where the contract appears on a written instrument, the instrument must be

warranty, and the buyer is not bound to prove wilful fraud.¹ In the former case, the seller is understood to say, "I will warrant that the subject-matter has certain qualities, but I will not warrant that it has any others." In the latter case, he is considered, by implication, as saying, "I undertake to pledge myself, that the subject-matter is what I describe it to be."

§ 514 *a*. It is not necessary that the misrepresentation should be made directly between the actual parties; for if a party make a representation to one person in respect to a sale, and that representation is known by the vendor to constitute the basis of a subsequent sale to a person to whom it is communicated, it will be treated as if it were made directly by the vendor himself.² Where, therefore, the defendant being about to sell a public house, falsely represented to B. that the receipts were £180 a month, and B. with the knowledge of the defendant communicated this representation to the plaintiff, who became the purchaser, it was held that an action lay against the defendant at the suit of the plaintiff.³ So, also, if

construed according to the intent of the parties. As, where the dealing is by a contract note, the article delivered must agree with the terms of the note; or, where a ship is insured, it must correspond with the warranties contained in the policy. What is the instrument here? Not a contract of sale, but a mere receipt, describing an antecedent contract. Are we to infer from the terms used, that the party had expressly contracted the animal should be four years old? The collocation of the word *warranted* shows that such was not the intention of the parties. *Richardson v. Brown* proceeded on this principle, and *Dickinson v. Gapp* is almost the same case as the present. Interpreting this instrument, therefore, according to the intention of the parties, I think it clear that the warranty was confined to soundness."

¹ *Shepherd v. Kain*, 5 Barn. & Ald. 240; *Winsor v. Lombard*, 18 Pick. R. 60; *Hogins v. Plympton*, 11 Pick. R. 99; *Power v. Barham*, 6 Nev. & Mann. 62; s. c. 4 Adolph. & Ell. 473; *Hastings v. Lovering*, 2 Pick. R. 214. See post, Sales.

² *Crocker v. Lewis*, 3 Sumner, R. 8; *Barden v. Keverberg*, 2 Mees. & Welsb. 63, 64.

³ *Pilmore v. Hood*, 5 Bing. N. C. 97. See also *Hill v. Gray*, 1 Stark. N. P. C. 434; *Langridge v. Levy*, 2 Mees. & Welsb. 519; *Medbury v. Watson*, 6 Metcalf, R. 247-260.

an agent make a misrepresentation which he was not authorized by his principal to make, the principal will be bound thereby, if he were a general agent, or if, being a special agent, he be held not to have a more enlarged authority.¹

§ 515. An action will lie against an uninterested person, for making a false and fraudulent representation of a fact as then existing, (and not otherwise,) to the seller, whereby the latter sustains damage by trusting the purchaser on the credit of such misrepresentation; and this doctrine, though formerly opposed, has been repeatedly affirmed in the English and American jurisprudence.² Thus, where a contract for the delivery of live-stock at a distant place would have been fulfilled, but for the false and fraudulent representations of a third person, (the defendant,) that the plaintiff had abandoned all intention of fulfilling it, in consequence of which the plaintiff, having come to the stipulated place with the drove, found that the bargainee had been supplied by the defendant, and incurred great expense and loss of time in disposing of it elsewhere; it was held, that an action would lie against the defendant, although the contract to deliver could not have been enforced against the plaintiff by action.³ But this rule only applies to cases where the representation by a third person is known by him to be false, since otherwise it can only have weight as an expression of opinion; for if it appear to have been made by him *bonâ fide*, he will not be liable, although it prove to be unfounded.⁴ Thus, where the defend-

¹ *Lobdell v. Baker*, 1 Metcalf, R. 202. See ante, Agents, § 134.

² *Pasley v. Freeman*, 3 T. R. 51; 2 Kent, Comm. Lect. 39, p. 489, and cases cited; *Eyre v. Dunsford*, 1 East, 318; *Allen v. Addington*, 7 Wend. 9.

³ *Benton v. Pratt*, 2 Wend. 385.

⁴ *Ashlin v. White*, Holt, R. 387; *Scott v. Lara*, Peake, R.; *Shrewsbury v. Blount*, 2 Mann. & Grang. 475; s. c. 2 Scott, N. R. 588; *Haycraft v. Creasy*, 2 East, R. 92; *Tapp v. Lee*, 3 Bos. & Pul. 367; *Gallager v. Brunel*, 6 Cowen, R. 346; *Hutchinson v. Bell*, 1 Taunt. R. 558; *Ames v. Milward*, 2 Moore, R. 713; s. c. 8 Taunt. R. 637; *Eyre v. Dunsford*, 1 East, R. 318; *Pasley v. Freeman*, 3 T. R. 51; *Foster v. Charles*, 6 Bing. R. 396; s. c. Bing.

ant, being consulted in relation to the credit of a third person, who had applied to the plaintiff to deal with him, stated that he knew of his own knowledge, that the party might be safely credited, and the plaintiff thereupon trusted him, and suffered a large loss in consequence, it was held that this statement of the defendant was only to be taken as a strong expression of confidence in the solvency of the party, and, as it was *bonâ fide*, did not render him liable.¹ This case, however, presses the doctrine quite as far as it would probably be upheld now. But wherever a person fraudulently, and with a design to deceive, misrepresents the circumstances of a third person, as an inducement to another to supply him goods on credit, or to make any contract, he will be liable therefor.² But in all such cases, the party deceived can only recover of the party making the fraudulent statement such damage as is fairly and immediately referable thereto,³ and if no damage is caused by the fraud, there is no right of action.⁴ And if a person who has sold goods on the representation by another of the purchaser's circumstances, afterwards refuse to sell a greater amount without further references, the person misrepresenting is not liable beyond the damages due at the date of such a refusal by the seller.⁵ But where the statement is fraudulent, it is not necessary to show that the defendant was benefited thereby,⁶ or

105; s. c. 4 Moore & P. 741; *Young v. Covell*, 8 Johns. R. 23; *Lord v. Godhard*, 13 How. R. 198.

¹ *Haycraft v. Creasy*, 2 East, R. 92. In this case Lord Kenyon disagreed with the other judges, and held that the affirmation by the defendant that the fact of the good credit of the party was within their *knowledge*, rendered him liable in damages. See post, § 868 *a* et seq. and cases cited.

² *Ibid.* *Hamar v. Alexander*, 2 Bos. & Pul. N. R. 241; *Hutchinson v. Bell*, 1 Taunt. R. 558; *Upton v. Vail*, 6 Johns. R. 183; *Pasley v. Freeman*, 3 T. R. 51; *Polhill v. Walter*, 3 Barn. & Adolph. 114; *Wilson v. Butler*, 4 Bing. N. C. 748. See post, Guaranty, § 868 *a*.

³ *Corbett v. Brown*, 8 Bing. R. 35; s. c. 5 Car. & Payne, 363. See *Stafford v. Newsom*, 9 Iredell, R. 507; *Tuckwell v. Lambert*, 5 Cush. R. 23.

⁴ *Fuller v. Hodgdon*, 25 Maine R. 243. *Ide v. Gray*, 11 Verm. R. 615.

⁵ *Ibid.* *Hutchinson v. Bell*, 1 Taunt. R. 558.

⁶ See *Young v. Hall*, 4 Georgia R. 95; *Stiles v. White*, 11 Met. R. 356.

that he colluded with any one who was, in order to entitle the plaintiff deceived to recover.¹ Nor is it necessary to prove a malicious motive therefor, since, if the party said what was false within his knowledge, and thereby occasioned an injury, it is a sufficient ground of action.² But where the fraudulent statement of a third party is not known or connived at by either of the original parties, as between them, the party who trusted to the misrepresentation should bear the loss, on the ground that, where one of two innocent parties must suffer, he whose act afforded the occasion for the injury should bear it.³ The party defrauded may, however, as we have seen, subsequently assent to the fraud, after he is in full knowledge of it, so as to destroy his right of action. Thus, if he should make a settlement or compromise of the whole matter with the other party, or should release him, he could not set aside the contract. So, also, mere silence and acquiescence for a long time, if entirely unexplained, might deprive him of his right, upon the presumption of a compromise or release, implied from the delay. So, also, the same presumption might arise, if, after the discovery of the fraud, the party defrauded still continue to deal with the other.⁴

CONCEALMENT.

§ 516. The general rule, both of law and equity, in respect to concealment, is, that mere silence, with regard to a material

¹ *Pasley v. Freeman*, 3 T. R. 51; *Eyre v. Dunsford*, 1 East, R. 318.

² *Foster v. Charles*, 4 M. & P. 61, 741; s. c. 6 Bing. R. 396; 7 Bing. R. 105; *Polhill v. Walter*, 3 Barn. & Adolph. 114; *Tapp v. Lee*, 3 Bos. & Pul. 367. See *Collins v. Denison*, 12 Met. R. 549; *Barley v. Walford*, 9 Q. B. R. 197; *Boyd v. Browne*, 6 Barr, R. 310.

³ *Lickbarrow v. Mason*, 2 T. R. 70; *Goodman v. Eastman*, 4 N. Hamp. R. 455; *Root v. French*, 13 Wend. R. 572; *Lane v. Borland*, 14 Maine R. 77.

⁴ *Parsons v. Hughes*, 9 Paige, 591; *Vigers v. Pike*, 8 Clarke & Fin. R. 562, 630.

fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed.¹ Thus, if A. knowing that there is a mine in the land of B., of which B. is ignorant, should contract to purchase the land without divulging the fact, it would be a valid contract, although the land was sold at a price which it would be worth without the mine; because A. is under no legal obligation, by the nature of the contract, to give any information thereof.² But this principle only applies to cases where the vendee is deceived by the silence of the vendor; for if a single word be spoken which tends to mislead him, the contract will be set aside for fraud.³ If, therefore, in the foregoing illustration, B. had suspected that there was a mine in the land, and had inquired whether he knew of any peculiarity about the land which gave it a greater value than it apparently had, and he had misled him, a court of equity would set aside the contract.⁴

§ 517. The law never undertakes to refine upon nice ethical distinctions; and although it lends no countenance to injustice, and will not support immorality, yet it often stops short of enforcing a merely honorary obligation. Questions of law must be determined upon general principles, which, although they reach the aggregate of cases, may often fail to extract the sting of injustice and immorality from the individual case. Thus, it is the general policy of the law, in order to induce vigilance and caution, and thereby to prevent those opportunities of deceit which lead to litigation, to throw upon every man the responsibilities of his own contracts, and to burden him

¹ See *Irvine v. Kirkpatrick*, 3 Eng. Law & Eq. R. 17; *Otis v. Raymond*, 3 Conn. 413; *Van Arsdale v. Howard*, 5 Ala. 596.

² *Fox v. Mackreth*, 2 Bro. Ch. R. 420; *Turner v. Harvey*, 1 Jacob, 178.

³ *Pidcock v. Bishop*, 3 Barn. & Cres. 605. See *Bench v. Sheldon*, 14 Barb. 66; *Kintzing v. McElrath*, 5 Barr, 467; *Pearce v. Blackwell*, 12 Iredell, 49; *Wood v. Ashe*, 3 Strob. 64; *Ferebee v. Gordon*, 13 Iredell, 350.

⁴ *Ibid.*

with the consequences of his careless mistakes. But this general rule, though founded in true policy, often affords occasions for that very deceit which it is one of the main objects of the rule to prevent. Thus, although a vendor is bound to employ no artifice or disguise, for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee. It is evident, however, that without some such general rule, the facilities of sales would be greatly impeded, and there would be no security to the vendor.¹

§ 518. But an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract.² Thus, for instance, in cases of insurance, the party insuring being under an obligation to acquaint the underwriter with all facts and circumstances affecting the risk, which are peculiarly within his knowledge, or which are not matters of general information, the concealment of any such fact or circumstance will be fatal to the contract of insurance.³ So, also, in sales by auction, by which goods are offered to the public under the profession that the highest bidder shall take them, the secret employment of by-bidders and puffers, by which the price is enhanced by pretended competition and fictitious bids, is a fraud, if it operate to deceive the buyer injuriously.⁴ So,

¹ Ante. 1 Story, Eq. Jurisp. § 201; 2 Kent, Comm. Lect. 39, p. 483, 484, (4th ed.); Wilkinson on Shipping, ch. 4, p. 89 to p. 103.

² 1 Story, Eq. Jur. § 204, 205, 206; 2 Kent, Comm. Lect. 39, p. 481; *Pidcock v. Bishop*, 3 Barn. & Cres. 605; *Fox v. Mackreth*, 2 Bro. Ch. R. 420; *Turner v. Harvey*, 1 Jacob. 178; *Farnam v. Brooks*, 9 Pick. R. 234.

³ Marshall on Ins. B. I. ch. 10, § 2; *Lindenau v. Desborough*, 8 Barn. & Cres. 586, 592; *Elton v. Larkins*, 5 Car. & Payne, 90.

⁴ Post, § 548.

also, if facts, which materially affect the nature or extent of a surety's liability, and tend to increase his risk, be concealed, or if he be suffered to make the agreement while he is deceived, the concealment is a fraud, which vitiates the contract.¹

§ 519. A distinction should here be observed between the concealment of *extrinsic* circumstances, affecting the value of the subject-matter of sale, or operating as an inducement to a contract, such as the state of the market; and the concealment of *intrinsic* circumstances appertaining to its nature, character, and condition, such as natural defects or injuries. In respect to *intrinsic* circumstances the rule is, that mere silence as to any thing which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case. But any concealment, by one party, of latent defects, which could not have been discovered by the other, and which were especially within the knowledge of the former, would avoid the contract; silence being considered a fraud, when trust is necessarily implied by the circumstances. *A fortiori*, any artifice employed to conceal a defect, or to deter a person from perceiving it, would be a direct fraud upon him.²

¹ *Pidcock v. Bishop*, 3 Barn. & Cres. 605; *Smout v. Ilbery*, 10 Mees. & Welsb. 1; *Railton v. Mathews*, 10 Clarke & Finell. 934; 2 Kent, Comm. Lect. 39, p. 483, (4th ed.). Some of the later cases have said that the language of Mr. Justice Bailey, in *Pidcock v. Bishop*, must be taken in connection with the actual facts in that case, in which there was actual fraud; and it has recently been held that a creditor who takes a guaranty is not bound to disclose to the surety every fact, in his own knowledge, which might affect the surety, or his willingness to enter into the contract. See *North British Ins. Co. v. Lloyd*, 28 Eng. Law & Eq. R. 456; *Owen v. Homan*, 25 Id. 1; *Hamilton v. Watson*, 12 Clarke & Finell. 149. See *Evans v. Keeland*, 9 Ala. 42. See post, § 868 a, for a full consideration of the subject.

² *Chisolm v. Gadsden*, 1 Strob. 220.

In respect to *extrinsic* circumstances, the rule is, that neither party is ordinarily bound to notify them to the other, and mere concealment will not nullify the contract. But the party concealing a fault must be careful to do no act, and say no word, indicative of his assent to any mistaken proposition by the other, and must play an entirely negative part, for if he do any thing positive, he will render himself liable.¹ For ex-

¹ Lord Brougham, in the case of *Small v. Atwood*, 6 Clarke & Finell. 232, speaking upon this subject, says: "If two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time that he stated it not to be true, and if, upon that statement of what is not true, and what is known by the party making it to be false, the contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contracts, an action of damages grounded upon the deceit, and there will be a relief in equity to the same party to escape from the contract which he has so been inveigled into making by the false representation of the other contracting party. In one case it is not necessary that all those three circumstances should concur in order to ground an action for damages at law, or a claim for relief in a court of equity; I mean in the case of warranty given, in which the party undertakes that it shall in point of fact be so, and in which case, therefore, no question can be raised upon the *scienter*, upon the fraud or wilful misrepresentation. In this case that is clearly out of the question, therefore all those three circumstances must combine: first, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and thirdly, and chiefly, in my view of the case, that it should be this false representation which gave rise to the contracting of the other party. '*Dolus dans locum contractui*,' is the language of the civil law, not *dolus malus* generally; not the mere fraudulent conduct of the party trying to overreach his adversary; not mere misconduct and falsehood throughout, unless *dedit locum contractui*; because then comes in the equitable principle of the civil law, which forms a part of all other systems of jurisprudence, whether founded upon it or not, being grounded on the highest consideration of natural equity, *Ex dolo non oritur contractus*."

"My Lords, the cases which have been referred to, and which are perfectly clear upon this point, may be shortly recalled to the recollection of your lordships, for the purpose of clearly showing that the materiality as well as the falsehood of the statement, and the knowledge of the party making it, that it

ample, if a vendee, having private information of an extrinsic event or fact, unknown to the vendor, and materially affecting

was untrue, must concur in order to give relief in equity, and to give an action for damages at law, the two remedies being coextensive and acting in exactly the same circumstances.

"The first case that is mentioned in suits of this sort, is that of *Lysney v. Selby*, Lord Raym. 1118, a case for affirming the rent of houses sold by defendant to plaintiff, to be more than it was, in which Lord Chief Justice Holt held, that if one buys upon a representation of so much rent, and relies upon it, and will inquire no further, if the representation be false, an action will lie; but, if the vendor will inquire further, that is, if not relying upon the representation of rent made, he says, 'I do not rely upon the representation, but I will satisfy myself by my own inquiry,' then Lord Holt seems to have been of opinion that the action would not lie. Then there is the case of *Dobell v. Stevens*, 3 Barn. & Cres. 623, before Lord Tenterden. It was a question on the purchase of an ale-house, arising out of a misrepresentation of the receipts of the house,—a very common case,—and Lord Tenterden, in directing the jury, said that he relied on the purchase of the ale-house having been made on the faith of the representation. Now suppose, instead of its having been made on the faith of the representation, the party had said, 'I draw so much beer in a month.' 'But,' says the other, 'I will not be satisfied with your telling me that; you will have no objection to verify and corroborate your statement of the draught, by giving me access to your beer books, or to your brewer's account.' 'Oh, with all the pleasure in the world,' says the vendor of the beerhouse; 'come, or send any person you choose.' And suppose the person had either gone and satisfied himself or sent his clerk, which clerk had made a report to him and said, I have looked through the books, and I am perfectly satisfied; or if the party, not satisfied with the clerk's report, had gone himself and looked at the beer books, and said, 'I see it is all right;' would he then be allowed, six months after that, to come and say, 'I will be off the bargain, because I find there is a less draught of beer than I expected?' Or could he have come with any success into Lord Chief Justice Tenterden's court, and asked for damages on the ground of misrepresentation, because, instead of three butts, there were only two butts of beer drawn? 'No,' my lord chief justice would have said; 'how can I say that the purchase was made upon the faith of that representation, when I know that the purchase was made upon your own examination of the books, and your clerk's report, which report of your clerk was confirmed by your own ocular inspection.' If your lordships look at the case of *Ekins v. Tresham*, 1 Lev. 102; s. c. Sid. 146, *nom.*; *Leakins v. Clissel*, your lordships will find the pleadings there set out, and that the defendant made such a representation, to

the sale, should conceal it, the contract would nevertheless be valid; because, there being no special trust, there is no legal

which representation the plaintiff '*adhibens fidem, donne à lui £500*;' so that '*adhibens fidem*' appears to have been an old rule—a peculiar expression, to which representation the party in question *tending faith*, did, as Lord Tenterden says, in *Dobell v. Stevens*, upon the faith of that representation, pay this £500. In *Edwards v. M'Leay*, 2 Swanst. 287, a case in equity, those cases which I have mentioned being at law, Lord Eldon holds that the false representation must be a falsehood, which the other party had no means of knowing. It must be a falsehood which is not common to both parties to inquire into and ascertain, a falsehood which is not open to the eyes of either the one or the other party, but which is within the knowledge of one party, not within the knowledge of the other, and consequently to one party telling the other, who has no other means of satisfying himself excepting listening to what is told him by the party alone knowing it, he *adhibens fidem* entered upon the contract, in which case equity will relieve him against it, because he had no other means of knowing, and he trusted to that representation alone, not to his own inquiry, and consequently it must be that which *dedit locum contractui*.

"Now, my Lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract.

"If a mere general intention to overreach were enough, I hardly know a contract, even between persons of very strict morality, that could stand; we generally find the case to be that there has been an attempt of the one party to overreach the other, and of the other to overreach the first; but that does not make void the contract. It must be shown that the attempt was made, and made with success, *cum fructu*. The party must not only have been minded to overreach, but he must actually have overreached. He must not only have given instructions to the agent to deceive, but the agent must, in fulfilment of his directions, have made a representation; and, moreover, the representation so made must have had the effect of deceiving the purchaser; and, moreover, the purchaser must have trusted to that representation, and not to his own acumen, not to his own perspicacity, not to inquiries of his own.

"I will not say that the two might not be mixed up together, the false representation of the seller and the inquiries of the buyer, in such a way as even

obligation for him to divulge it.¹ Thus, where a person has received private information of an advance on the price of a certain article in a foreign market, and he thereupon makes a purchase of a quantity of it, without advertising the vendor of the fact, the sale is good. So, also, where the plaintiff, having private information of the treaty of peace, signed at Ghent, purchased of B. a quantity of tobacco, without informing him of such fact, although B., at the time, asked him if there were any news calculated to enhance the price of tobacco, to which he did not give any answer; it was held, that his concealment was not a legal fraud, because he was not legally bound to communicate the fact.²

§ 520. But, if there be a special trust or confidence between two parties, growing out of the circumstances of the case, the concealment of a material fact in regard to the subject-matter will annul the contract. Thus, if a vendor should sell an estate to which he knew that he had no title; or should conceal the fact that there were incumbrances thereupon;³ or should sell a house, situated in a distant town, which he knew, at the time of the sale, to be destroyed, or greatly injured by fire, the contract, in all these cases, would be void; because there is evidently a trust reposed by the vendee in the vendor, in the one case with regard to the clear title, or in the other case in regard to the existence of the thing.⁴ So, also, when-

then to give a right to relief. I do not find that there is any thing in this cause that makes it necessary to deal with that argument."

¹ 1 Story, Eq. Jurisp. § 148, § 149, § 197, and note; § 205, § 207, § 208; 2 Kent, Comm. Lect. 39, p. 484, 485, (4th ed.); *Laidlaw v. Organ*, 2 Wheat. 178, 195.

² *Laidlaw v. Organ*, 2 Wheat. R. 178. But was not the buyer bound to answer the question, and was not his silence equivalent to a statement that there was no such news, and did it not actually operate as a direct fraud on the seller, as much as if he had asserted the fact that there was no news?

³ *Arnot v. Biscoe*, 1 Ves. 95; *Pilling v. Armitage*, 12 Ves. 78. But see *Greenby v. Cheevers*, 9 Johns. R. 126.

⁴ Story, Eq. Jur. § 142, § 208, § 209; *Pilling v. Armitage*, 12 Ves. 78; *Pothier de Vente*, n. 240, n. 4; *Dig. Lib.* 18, tit. 1, l. 57, § 1.

ever silence would be equivalent to a misrepresentation, or assent to a false statement, no party would be permitted to be silent. Where, therefore, A. represented in writing to B. that C. was entitled to credit, concealing the fact that C. was a minor, under the belief that C. would not obtain credit, if he should be known not to be of age, it was held to be a fraud, which would entitle B. to recover from A. the amount of goods sold to C. in consequence of his representation, without first bringing an action against C.¹ So, if the vendor of a picture,

¹ *Kidney v. Stoddard*, 7 Metcalf, R. 252. Hubbard, J., in delivering the opinion of the court, said: "It is argued that the jury were compelled to find for the plaintiffs, on the mere concealment of a single fact by the defendant; or, in other words, that the charge of the presiding judge was erroneous. But the jury were not directed to return a verdict for the plaintiffs, unless they found, as a fact, that the defendant concealed that his son was a minor, with a view to give him a credit, and knowing or believing that he would not obtain a credit if that fact were known.

"It is very certain, as has been maintained by the defendant's counsel, that a mistaken opinion, honestly given, can never be taken as a fraudulent representation. This is true in principle, and supported abundantly by authorities. But the misfortune of the defendant's case is, that the verdict of the jury rests not on the honest mistake of the defendant, but upon the ground of material concealment of a fact especially within his knowledge; a fact important to be known, as it regarded the credit of the son; a fact designedly concealed, and with the view of obtaining that credit for the son, which he, the father, knew or believed he could not obtain if that fact were known.

"It needs no lengthened argument to establish the materiality of the fact. The result of this case is a sufficient witness of it. The plaintiffs were induced by the letter, from which this fact was carefully excluded, to give a credit to the son, which they would not otherwise have given; and as the direct consequence of it, they have sustained the loss set out in the declaration. Here then are proved fraud and deceit on the part of the defendant, and damage to the plaintiffs; and these facts have long been held to constitute a substantial cause of action. From the time of the judgment in the great case of *Pasley v. Freeman*, 3 T. R. 51, to the present day, through the long line of decisions both in England and America, the principle of that case, though with some statute modifications, remains unshaken and unimpaired." See also *McConnell v. Wilcox*, 1 Scam. R. 344. In *Tryon v. Whitmarsh*, 1 Metcalf, R. 1, the court say: "We are of opinion that the question for the jury was, whether the defendant knew that the assertion or opinion contained in

knowing that the vendee labors under a delusion in respect to it, which materially influences his judgment, permit him to purchase it, without removing the delusion, the sale would be a fraud.¹ So, also, if a man, knowing himself to be insolvent, and incapable of making payment, purchase goods of another, who sells to him in the implicit belief in his solvency and good faith, the concealment would be a direct fraud,² for which relief might be obtained either in law or in equity.³ *A fortiori*, where a party purchases goods with an intent not to pay for them, it is a fraud which vitiates the contract, and in some of the States in this country would subject him to a criminal prosecution. So, also, wherever it is the usage of trade to state any objections to the subject-matter, or any defects which may exist in it, silence in respect to them would operate as a fraud. Thus, where, in an action on the case for deceit in the sale of some pimento, the declaration alleged that it was sold at auction, as not sea-damaged, whereas it was in reality sea-damaged, and at the trial it was proved that, in the sale of sea-damaged pimento at auction, it was the custom to state that it was sea-damaged, and that if nothing were said in

his letter was false, or that he did not fully believe it to be true, or whether he did not conceal a material fact from the knowledge of the plaintiffs, with the intention to deceive them. It is true, as the defendant's counsel have argued, that the defendant was not bound to disclose the facts on which his opinion was founded; but if he kept back any material fact, with an intent to deceive the plaintiffs, this would be fraudulent."

¹ *Hill v. Gray*, 1 Stark. R. 434. See also *Turner v. Harvey*, 1 Jacob, R. 169; *Matthews v. Bliss*, 22 Pick. R. 53.

² But see *contra*, *Cross v. Peters*, 1 Greenl. 378; *Powell v. Bradlee*, 9 Gill & Johns. 220; *Redington v. Roberts*, 25 Verm. 686; *Smith v. Smith*, 9 Harris, 367.

³ *Earl of Bristol v. Wilshire*, 2 Dowl. & Ryl. 755; s. c. 1 Barn. & Cres. 519; *Ash v. Putnam*, 1 Hill, 302; *Load v. Green*, 15 Mees. & Welsb. 216; *Mackinly v. McGregor*, 3 Whart. 370; *Thompson v. Rose*, 16 Conn. R. 71; *Conyers v. Ennis*, 2 Mason, R. 239; *Irving v. Motly*, 7 Bing. 543; *Lloyd v. Brewster*, 4 Paige, Ch. R. 537; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Hogan v. Shee*, 2 Esp. 523; *De Symons v. Minchwich*, 1 Esp. R. 430; *Read v. Hutchinson*, 3 Camp. R. 352.

respect to its condition, it was understood to be sound, and that the seller was silent in this case, it was held, that the action was maintainable, for silence under such circumstances amounted to a fraud.¹ So, also, if one party should state certain facts in relation to the subject-matter of a contract, in presence of the other, and the other should be silent when he ought to answer, his silence would be an assent thereto, and he would be bound in like manner as if he had actually made the statement himself.

§ 521. If, however, this special trust and confidence be not merely a special implication from the circumstances of the case, but grow out of the relationship of the parties to each other, the utmost good faith must be observed, and concealments, which would ordinarily not vitiate a contract, will be sufficient to invalidate contracts between such persons.² It behooves, therefore, persons, standing in the relation of attorney, or trustee, or guardian, or agent, to exercise the strictest caution and the most entire openness in dealing with their clients, *fidei commissaries*, ward, or principal.³ Indeed, so careful is the law in its rules respecting persons occupying such fiduciary relations, that where contracts are made by a trustee with the *cestui que trust*, it is not sufficient to show that no advantage has been taken, but the *cestui que trust* may set aside the transaction at his own option.⁴ So, also, agents are not allowed to purchase of their principals, unless upon the most entire good faith, and after a full disclosure of all facts and circum-

¹ Jones v. Bowden, 4 Taunt. R. 847. See also Swancott v. Westgarth, 4 East, R. 75; Gordon v. Swan, 2 Camp. R. 429, n.

² 1 Story, Eq. Jurisp. § 307, et seq., and cases cited; Goddard v. Carlisle, 9 Price, R. 169; Gallatien v. Cunningham, 8 Cowen, R. 361; Gartside v. Isherwood, 1 Bro. Ch. R. App. 560.

³ Welles v. Middleton, 1 Cox, R. 112; 3 P. Wms. 131, and Cox's note (1); Wright v. Proud, 13 Ves. R. 136; Jones v. Thomas, 2 Younge & Coll. 498.

⁴ Cane v. Lord Allen, 2 Dow. R. 289; Hunter v. Atkins, 3 Myl. & Keen, R. 113; 1 Story, Eq. Jurisp. § 311; Dawson v. Massey, 1 Ball & Beatt. 229.

stances, and an absence of all undue advantage or influence.¹ Indeed, in all these relations, any undue advantage or concealment will avoid the contract. Yet, if the subject-matter of the bargain be of a complicated nature, such as an account, running over many years and through many volumes, and relating to actions, which may in a measure have passed out of the memory, all that would seem to be necessary, on the part of an agent, if there were entire good faith, would be to give information sufficient to lead the principal to inquiry, to be willing to answer all questions, and to submit all the materials of knowledge possessed by the agent.²

§ 522. A distinction may, however, exist between executory and executed contracts, where material facts have been concealed. And a court of equity will sometimes refuse to set aside a contract which is wholly performed, although there may have been a concealment of facts, when, if the contract were executory, it would not decree a specific performance.³ So, also, if the case were without the reach of equity, being susceptible of an accurate adjustment of damages at law, a jury might well refuse to give more than merely nominal damages, in cases where a court of equity would refuse to decree a specific performance.

FRAUD UPON THIRD PERSONS.

§ 523. In the next place as to Fraud upon Third Persons. Where any agreement is made, which operates as a fraud upon third persons, it is void. The principal class of cases, to

¹ *Crowe v. Ballard*, 3 Bro. Ch. R. 117; *Purcell v. Macnamara*, 14 Ves. R. 91; *Green v. Winter*, 1 Johns. Ch. R. 27; *Parkist v. Alexander*, 1 Johns. Ch. R. 394.

² *Farnam v. Brooks*, 9 Pick. R. 213, 227.

³ 1 Story, Eq. Jurisp. § 206; 2 Kent, Comm. Lect. 39, p. 490, 491; *Ellard v. Llandaff*, 1 Ball & Beatt. 250; 2 Story, Eq. Jurisp. § 692, 769, 770.

which this rule applies, are cases where a debtor, on the verge of insolvency, makes an assignment of his goods to some person in trust for himself, and without consideration to support it. Such contracts are utterly void at common law, not only because they operate as a palpable fraud upon creditors, but also because they are not founded upon a sufficient consideration.¹ But so anxious has been the desire to protect creditors against such frauds, that the statute of 13 Elizabeth, ch. 5, was passed, *ex majori cautela*, affirming the rule of the common law, and declaring all conveyances of goods and chattels, not made *bonâ fide*, and upon good consideration, but in trust for the use of the persons conveying them, or made to hinder, delay, or defraud creditors, to be void. This statute has been reënacted in New York, and its essential provisions have been universally adopted in the United States.²

§ 524. This statute does not, however, apply to voluntary assignments by a debtor, for the benefit of all his creditors — or of a part of them — provided it be upon a sufficient consideration; for the mere fact, that it operates to give one or more creditors a preference over the others is not sufficient to invalidate it.³ So, also, at common law, a debtor may assign or transfer all his property to a single creditor, for the purpose of giving him a preference over all the others, provided such transfer be not manifestly excessive, and disproportioned to the debts, which it is intended to cover. And in such a case, the other creditors can only satisfy their debt out of the surplus.⁴

¹ *Cadogan v. Kennett*, Cowp. R. 439; *Hamilton v. Russell*, 1 Cranch, R. 316; *Meeker v. Wilson*, 1 Gall. R. 419; 2 Kent, Comm. Lect. 39, p. 515; *Copis v. Middleton*, 2 Madd. R. 428; 1 Story, Eq. Jurisp. § 353; *Partridge v. Gopp*, 1 Eden, R. 166, 167, 168; *Edwards v. Mitchell*, 1 Gray, 239.

² 1 Story, Eq. Jurisp. § 352, 353; 2 Kent, Comm. Lect. 39, p. 515.

³ *Holbird v. Anderson*, 5 T. R. 235; *Pickstock v. Lyster*, 3 Maule & Selw. 371; *Stevens v. Bell*, 6 Mass. R. 342; *Murray v. Riggs*, 15 Johns. 571; *Haven v. Richardson*, 5 N. Hamp. R. 113; *Burd v. Smith*, 4 Dall. R. 85; *Halsey v. Whitney*, 4 Mason, R. 211; *Ingraham v. Wheeler*, 6 Conn. R. 277.

⁴ *Pickstock v. Lyster*, 3 Maule & Selw. 371; *The King v. Watson*, 3 Price,

But where there is a statute of bankruptcy, it supersedes any arrangement which may be made between the debtor and creditor in contravention of its policy or provisions.¹

§ 525. Where an assignment is made, it is not ordinarily necessary that the creditors should be made technical parties thereto, or give an express assent at the time it is made, but if they subsequently sign it, or expressly assent to it, or receive the benefit of it, they will be bound in like manner as if they had originally been parties.² Indeed, where an assignment is absolute, their assent will be presumed; but not where it is conditional.³ The mere fact that an assignment is conditional, — as if it require a general release of liability from the creditors, — or that it reserves the ultimate surplus to the debtor, — or does not purport to convey the whole property of the debtor, will not render it fraudulent. But whether an assignment, on condition that a release shall be given, does not contravene the statute by tending to delay and defeat creditors,

Excheq. R. 6; *Wilt v. Franklin*, 1 Binn. R. 502; *Hendricks v. Robinson*, 2 Johns. Ch. Cas. 307, 308; *Nicoll v. Mumford*, 4 Johns. Ch. Cas. 529; *Brown v. Minturn*, 2 Gall. R. 557; *Marbury v. Brooks*, 7 Wheat. R. 556; *Brashear v. West*, 7 Peters, R. 608; *Grover v. Wakeman*, 11 Wend. R. 194; *Moffart v. McDowell*, 1 McCord, Ch. R. 434. In Georgia, New Jersey, Ohio, Massachusetts, Connecticut, the rule is controlled by statute. *Varnum v. Camp*, 1 Green, (N. J.) R. 326; *Prince*, Dig. 164; Stat. of Ohio, 1838; Massachusetts Insolvent Act of 1838; Stat. of Connecticut, 1838; 2 Kent, Comm. Lect. 39, p. 531.

¹ *Halsey v. Whitney*, 4 Mason, R. 210; *Binns v. Towsey*, 3 Nev. & P. 91; *Davies v. Acocks*, 2 Crompt. Mees. & Rosc. 461; *Knight v. Fergusson*, 5 Mees. & Welsb. 389, *supra*.

² *Halsey v. Whitney*, 4 Mason, R. 210, 215; *Hastings v. Baldwin*, 17 Mass. R. 552; *Marbury v. Brooks*, 7 Wheat. R. 556; 11 Wheat. R. 78; *Brashear v. West*, 7 Peters, R. 608; *Ellison v. Ellison*, 6 Ves. R. 656. But see *Widgery v. Haskell*, 5 Mass. R. 144.

³ *Halsey v. Whitney*, 4 Mason, R. 210; *Marbury v. Brooks*, 7 Wheat. R. 556; s. c. 11 Wheat. R. 78; *Seaving v. Brinkerhoff*, 5 Johns. Ch. R. 329; *Thompson v. Leach*, 2 Vent. R. 198; *Austin v. Bell*, 20 Johns. R. 442; *Small v. Marwood*, 9 Barn. & Cres. 300; *Estwick v. Caillaud*, 5 T. R. 420; *Pickstock v. Lyster*, 3 Maule & Selw. 371.

has been a subject of much discussion and contradictory decision, although it seems finally to be settled, that such a condition does not vitiate the agreement.¹

¹ *Halsey v. Whitney*, 4 Mason, R. 227. In this case Mr. Justice Story fully reviews the cases on this subject in this country, and affirms the rule of the text. He says, "A far more difficult question is that presented by the consideration, whether a debtor can rightfully stipulate for a release from his creditors, as the condition of yielding up his property to them. I am aware, that it may be said, that the property may be reached by a trustee process, so that it cannot be absolutely locked up from his creditors. But the question never can be, whether a remedy exists for the creditors, but whether the debtor has not endeavored fraudulently to delay or defeat them. This objection has struck me to be of great force, and I have paused upon it with no small hesitation of opinion. Where a debtor assigns all his property for the benefit of all his creditors, without stipulating for any favor to himself, he cannot be said to lock up his property from his creditors. The most that can be said is, that he locks it up from one, by giving it unconditionally to all. But where he stipulates for a release, he surrenders nothing except upon his own terms. He attempts to coerce his creditors by withholding from them all his property, unless they are willing to take what he pleases to give, or is able to give, in discharge of their debts. This is certainly a delay, and if the assignment be valid, to some extent a defeating of their rights. It is not sufficient to say, that it is a proposition to creditors; so would be a condition by the debtor to receive a gross sum. The object and nature of the proposition are to be considered in order to decide whether it be fraudulent or not. Has it not a tendency to obstruct the common rights of the creditors? Is not its design to prevent creditors from receiving compensation out of the debtor's property, without yielding up some portion of their debts, and conferring on him a substantial benefit, which he has no legal claim to demand? In *Seaving v. Brinkerhoff*, 5 Johns. Ch. R. 329, where there was an assignment of real estate (not purporting to be all the estate of the debtor) for the use of all the creditors, upon the condition of their executing a release, that very learned judge, Mr. Chancellor Kent, held, that the assignment was, on that account, fraudulent and void, and that the condition was oppressive, and without any color of justice, as the assignment was not of all the property of the debtor, but only of a part. The reasoning of the court in *Hyslop v. Clark*, 14 Johns. R. 459, though the case itself was distinguishable from the present, is, as far as it goes, strong against such a stipulation, where the assignment is of all the property. That case and its reasoning, met the entire approbation of Chief Justice Spenser, in his able opinion in *Austin v. Bell*, 20 Johns. 442; and on that occasion the latter, in behalf of the court, declared, 'that a deed, which does

§ 526. But where a debtor, in embarrassed circumstances, enters into an arrangement with all his creditors, to pay them a

not fairly devote the property of a person overwhelmed with debt to the payment of creditors, but reserves a portion to himself, unless the creditor assent to such terms as he shall prescribe, is in law fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder, or defraud creditors of their just and legal actions.' Had the court considered the principle fully adopted and recognized in *Seaving v. Brinkerhoff*, 5 Johns. Clr. R. 329, and *Burd v. Smith*, 4 Dall. 76? Tried by this principle, the stipulation in the present case would make the assignment utterly void, for the surplus, after payment of the assenting creditors, is to go to the debtor. The question is not, (I repeat it,) and cannot be, whether there may not be some remedy for the creditors to intercept the surplus, but whether the intent, apparent upon the deed itself, be not to coerce them to a settlement by embarrassing or delaying their remedy. Such an intent is of itself illegal. In examining the Massachusetts Reports, the point does not appear to have met with any direct decision. In *Widgery v. Haskell*, 5 Mass. R. 144; *Ingraham v. Geyer*, 13 Mass. R. 146; and *Harris v. Sumner*, 2 Pick. 129; there are intimations, which might well lead one to doubt, if the court were prepared to admit the validity of such a stipulation. On the other hand, in *Hatch v. Smith*, 5 Mass. R. 42, there was a stipulation for a release, and no exception was taken to it, though the case was contested by very eminent counsel. The case turned, indeed, in the judgment of the court, upon a point somewhat more close, for the creditors, to an amount beyond the property conveyed, agreed to the deed before it was executed by the debtor, and the assignment was upheld. Then, again, in *Hastings v. Baldwin*, 17 Mass. R. 552, where the assignment was held not to be fraudulent, we are now told by the counsel, that there was such a stipulation, although it is omitted in the report, no question having been raised on that point. Yet, doubtless, if the court had thought such a stipulation *per se* fraudulent, that was as fit a case as could arise, for the application of the principle. The decisions in Massachusetts, therefore, leave the question *in equilibrio*. But when we take into consideration the great length of time, during which stipulations of this nature have prevailed in this State, without objection, there is much reason to believe, that the profession have deemed the law settled in favor of the debtor on this point.

“Then, on the other hand, in *Lippincott v. Barker*, 2 Binn. 174, where the direct point arose, it was settled, that a stipulation for a release was not fraudulent. The reasoning of the court is limited, indeed, to the circumstances of that particular case, but it would be difficult not to perceive, that it naturally reaches further. I find also, that my brother, Mr. Justice Washington, in *Pierpont v. Lord*, in 1820, is reported to have held, that an assignment in trust, for the benefit of such creditors as should release their debts, is founded

certain proportion of their claims, in consideration of a discharge of their demands, — if he privately agree to give a better or further security to one, than to the others, the contract is void, because the very basis of the composition is, that each creditor shall receive an equal benefit, and take a proportionate share.¹ Thus, where A. was indebted to the plaintiff, and, being embarrassed, made an agreement with him, that if the plaintiff would procure a composition from the creditors, he, A., would give him security for the repayment of his debt; and thereupon the defendant became surety for A., upon a joint promissory note, agreeing that the transaction should be concealed from the creditors, and the plaintiff failed in obtaining a composition; it was held, that he could not recover against the defendant upon the note, because the transaction was fraudulent, and therefore void, in its inception.² But any arrangement made by the debtor with one of his creditors, in preference of a particular debt, after the deed of composition has been signed, will not be considered as a fraud upon the other creditors, if there

upon a sufficient consideration in law. The case is not in point, but it was probably decided on the general principle. There is, however, a case in England directly in point. It is the King in aid of *Braddock v. Watson*, 3 Price, 6, where the very exception was taken by counsel, and the assignment was held good by the Court of Exchequer against the claim of the crown itself." See *Small v. Marwood*, 9 Barn. & Cres. 300; *Goss v. Neale*, 5 Moore, R. 19.

"The weight of authority is then in favor of the stipulation, for the decisions in New York did not turn upon the naked point of a release, but upon that, as incorporated into a peculiar trust. I am free to say, that if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield, without reluctance, to what seems the tone of authority in favor of them."

¹ 1 Story, Eq. Jurisp. § 378, 379; *Chesterfield v. Janssen*, 1 Atk. 352; *Case v. Gerrish*, 15 Pick. 50; *Clarke v. White*, 12 Peters, 178; *Wiggin v. Bush*, 12 Johns. 306; *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Loomis*, 4 T. R. 166.

² *Wells v. Girling*, 4 Moore, 78; s. c. 1 Bro. & Bing. 447. See also *Alsager v. Spalding*, 6 Scott, 204; s. c. 4 Bing. N. C. 407; *Hlowden v. Haigh*, 11 Adolph. & Ell. 1033.

were no previous agreement to make such an arrangement, which operated as a consideration for the composition deed.¹

§ 527. Again, where a man is deeply indebted, or in embarrassed circumstances, every voluntary assignment or conveyance to third persons, not his creditors, for which a *valuable* consideration is not given, can be avoided by the creditors; and a creditor may, notwithstanding the conveyance, avail himself of all his legal remedies for collecting his debts out of the estate, treating the property as still belonging to the vendor.² A gift or conveyance, therefore, founded merely upon a *good* consideration, such as blood or affection, may be set aside by the creditors, if it appear that the grantor was in embarrassed circumstances when he made it; for, as it has been said, a man should be just before he is generous, and he is bound, both legally and morally, to pay his debts before giving away his property. But the mere fact that a man is indebted will not render his gift voidable, provided it appear that he is only indebted to a small amount in proportion to his property, and is wholly unembarrassed, and is able to make the conveyance.³ Nor does his subsequent insolvency entitle his creditors to set aside a conveyance made by him at a former time, when he was in perfectly unembarrassed circumstances, and done *bonâ fide*. And, although the cases are by no means free from apparent diversity on this point, it will be found to arise only from a difference of opinion as to what amount of indebtedment constitutes sufficient evidence of fraud.⁴ Of course, a volun-

¹ Knight v. Hunt, 5 Bing. 432.

² Owen v. Dixon, 17 Conn. R. 492.

³ Hinde's Lessee v. Longworth, 11 Wheat. R. 199; Verplank v. Sterry, 12 Johns. R. 536; Reade v. Livingston, 3 Johns. Ch. Cases, 481, 497, 501; Sexton v. Wheaton, 8 Wheat. R. 229; Blennet v. Bedford Bank, 11 Mass. R. 421; Cadogan v. Kennett, Cowp. R. 432; 1 Story, Eq. Jur. § 362, 362 a, 363, 364, 365.

⁴ See 1 Story, Eq. Jur. § 355 to § 365, in which Mr. Justice Story reviews the principal cases, and gives the weight of his opinion in favor of the rule, as stated in the text. The Supreme Court of the United States has held the same doctrine. Sexton v. Wheaton, 8 Wheat. R. 229; Hinde's Lessee v. Longworth, 11 Wheat. R. 199. And it is in accordance with the case of

tary conveyance of property, which could not be appropriated by creditors, would not come within the rule, and would be valid, if it were founded on a merely good consideration.¹

§ 528. But although creditors may set aside a conveyance made to a third party in fraud of their right, the grantee or assignee, and his heirs, and all persons taking under him or them in privity of estate, with notice of the fraud, would be bound by the conveyance or assignment.²

§ 529. Again, another class of cases, in which the law implies fraud against third persons, is to be found in contracts for the sale of property by a debtor, which, by the agreement, is to remain in the possession of the vendor. As far as concerns the immediate parties to such contracts, the sale would be binding.³ But as to creditors, it would be treated merely as a fraud, unless the sale be completely *bonâ fide*, or unless the subsequent possession by the vendor appear to be merely the condition of an executory contract.⁴

Cadogan v. Kennett, Cowp. R. 432, and Doe v. Routledge, Cowp. R. 705; and the recent case of Townsend v. Westacott, 2 Beav. R. 340, 345. So, also, see Salmon v. Bennett, 1 Conn. R. 525, in which the same rule is sustained by the Supreme Court of Connecticut, and Verplank v. Sterry, 12 Johns. R. 536.

¹ Dundas v. Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, R. 235; McCarthy v. Goold, 1 Ball & Beat. 390; Grogan v. Cooke, 2 Ball & Beat. 233; Caillaud v. Estwick, 2 Anst. R. 381; Nantes v. Corrock, 9 Ves. 188, 189; Rider v. Kidder, 10 Ves. R. 368; Guy v. Pearkes, 18 Ves. R. 196, 197; Matthews v. Feaver, 1 Cox, R. 278; 1 Story, Eq. Jur. § 367.

² 1 Story, Eq. Jur. § 371; Randall v. Phillips, 3 Mason, R. 378; Curtis v. Price, 12 Ves. R. 103.

³ Hawes v. Leader, Cro. Jac. 270; Martindale v. Booth, 3 Barn. & Ald. 505; Steel v. Brown, 1 Taunt. R. 381; Baker v. Lloyd, Bull. N. P. 258; Robinson v. McDonnell, 2 Barn. & Ald. 134; Doe v. Roberts, 2 Barn. & Ald. 367; Deady v. Harrison, 1 Stark. R. 60; Banks v. Thomas, 1 Meigs, R. 33; Nichols v. Patten, 18 Maine, R. 231; Jones v. Yates, 9 Barn. & Cres. 532.

⁴ Edwards v. Harben, 2 T. R. 587. In this case, Buller, J. said: "But if the deed or conveyance be *conditional*, there the vendor's continuing in pos-

§ 530. If the conveyance, or bill of sale, be conditional on its face, and possession be not, by its terms, to be surrendered,

session does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds, or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as *accompanying and following* the deed. That case has been universally followed by all the cases since. One of the strongest is quoted in Bucknal and others *v.* Roiston, Pr. in Chan. 287; there one Brewer, having shipped a cargo of goods, borrowed of the plaintiff £600 on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff; there Sir E. Northey cited a case 'where a man took out execution against another; by agreement between them, the owner was to keep the possession of them upon certain terms, and afterwards another obtained judgment against the same man, and took the goods in execution; and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property.' And he said it had been ruled forty times in his experience at Guildhall, that if a man sell goods, and still continues in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The lord chancellor held in the principal case, that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage, and Brewer's keeping possession of them was not to give a false credit to him, as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the chancellor in that case proceeded on the distinction which I have taken; he supported the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent." This case is also cited and approved by Mr. Ch. Just. Marshall, in *Hamilton v. Russel*, 1 Cranch, R. 310; *Cadogan v. Kennett*, Cowp. R. 432; *Jarman v. Woolloton*, 3 T. R. 618; *Stone v. Grubham*, 2 Bulst. R. 225; *Bucknal v. Rois-*

until such condition is performed, the contract is binding against the creditors, if it be in other respects *bonâ fide*, and for a valuable consideration. So, also, if the transaction be *bonâ fide* and merely by way of mortgage, or collateral security, it would be good.¹ In many of the States in the United States, it is declared by statute, that a mortgage should not be considered as fraudulent, although possession is retained by the mortgagor; provided, that record thereof be duly made; for the record is considered as constructive notice of the transaction to the creditors.² The only effect of such statute would, however, seem to be in affirmation of the rule of the common law. But where the bill of sale, or conveyance, is absolute, and the vendor nevertheless retains possession, a presumption of fraud would in all cases arise. But whether the mere fact, that the vendor is to retain possession, is to be considered as affording *primâ facie* evidence of fraud, which may be rebutted by proof, — or as affording conclusive evidence of fraud, — is a question open to much doubt, and in respect to which the cases are distressingly contradictory.

ton, Prec. in Ch. 285; Reed v. Wilmot, 7 Bing. R. 577; s. c. 5 Moore & Payne, 553; Stephenson v. Clarke, 20 Verm. (5 Washburn) R. 628; Cadbury v. Nolen, 5 Barr, R. 320.

¹ Martindale v. Booth, 3 Barn. & Adolph. 498; Minshall v. Lloyd, 2 Mees. & Welsb. 450; Steward v. Lombe, 1 Brod. & Bing. 510, 512; D'Wolf v. Harris, 4 Mason, R. 515; Ward v. Sumner, 5 Pick. R. 59; Kidd v. Rawlinson, 2 Bos. & Pul. 59; Glover v. Austin, 6 Pick. R. 220; Conard v. Atlantic Ins. Co. 1 Peters, R. 449; Bissell v. Hopkins, 3 Cowen, R. 166; Holbrook v. Baker, 5 Greenl. R. 309; Edwards v. Harben, 2 T. R. 595; Armstrong v. Baldock, Gow, R. 35.

² Mass. Revised Statutes, part 2, tit. 6, ch. 74, § 5; Forbes v. Parker, 16 Pick. R. 462; Bullock v. Williams, 16 Pick. R. 33; Shurtleff v. Willard, 19 Pick. R. 202. See also laws of New York, sess. 56, ch. 279; Lee v. Huntoon, 1 Hoffman, Ch. R. 448; Camp v. Camp, 2 Hill, R. 628; Statute of Kentucky, Dec. 13, 1820, Feb. 22, 1837, Feb. 1, 1839; Stat. of Georgia, Dec. 26, 1827; Stat. of Virginia, Dec. 1792, Feb. 1819; Indiana Rev. Stat. 1838, p. 470; Stat. of Tennessee, 1831; Stat. of Connecticut, 1838, p. 72, 73; Rev. Stat. of Vermont, 1839, p. 317. See 2 Kent, Comm. Lect. 39, p. 530, n.

§ 531. The first case on this subject, and one of the leading cases, is Twyne's case, which was decided in the Star-Chamber in the forty-fourth year of the reign of Queen Elizabeth.¹ The facts of that case were as follows. Pierce was indebted to Twyne in £400, and was also indebted to C. in £200. Pending an action by C. to recover his demand, Pierce, being possessed of goods to the value of £300, secretly, by deed, conveyed all his goods and chattels to Twyne, in satisfaction of Twyne's debt. Pierce, however, continued in possession, and sold some of the goods, notwithstanding the deed, and sheared some sheep, that were a part of the effects, and marked them with his own mark. C. having afterwards obtained judgment, endeavored to levy execution on the goods, but was resisted by Twyne. The question, which the court were called upon to decide, was, whether the conveyance was fraudulent by the statute of 13 Elizabeth; and they held, that it was, on the following grounds. "1st. That it had the signs and marks of fraud, because it is general, without exception of his apparel, or any thing of necessity; for it is commonly said, *quod dolus versatur in generalibus*. 2d. The donor continued in possession, and used them as his own, and by reason thereof, he traded and trafficked with others, and defrauded, and deceived them.² 3d. It was made in secret, *et dona clandestina sunt semper suspiciosa*. 4th. It was made pending the writ.³ 5th. There was a trust between the parties; for the donor possessed all and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the covert of fraud. 6th. The deed contains, that the deed was made honestly, truly, and *bonâ fide*; *et clausulæ inconsuetæ semper inducunt suspicionem*."

¹ Fermor's Case, 3 Coke, R. 80; s. c. reported under the name of Chamberlain v. Twyne, Moore, R. 638. See also Shep. Touchstone, 66.

² See Worsley v. Demattos, 1 Burr. R. 482.

³ See Holbird v. Anderson, 5 T. R. 235; wherein it was held, that a bill of sale will not be deemed fraudulent, merely because it was executed pending an action against the vendor.

§ 532. The next leading case on this subject was *Edwards v. Harben*.¹ In this case, Mercer offered to Harben a bill of sale of sundry chattels as a security for a debt. This Harben refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt should remain unpaid, to take possession of the goods, and sell them in satisfaction of the debt, returning the surplus money to Mercer. A bill of sale was accordingly executed, purporting on the face of it to be absolute, and a corkscrew was delivered to Harben in the name of the whole. Mercer died within the fourteen days, and immediately upon their expiration Harben took possession of the goods and sold them. A suit was then brought by Edwards, a creditor of Mercer, charging Harben as executor in his own wrong; and the question was, whether this bill of sale was fraudulent and void, because it was not accompanied by a delivery of possession, although it was on its face absolute. It was determined to be fraudulent, and it was said by Buller, J., in the judgment, that all the judges of England had been consulted on a motion for a new trial in the case of *Bamford v. Baron*, and were unanimously of opinion, that "unless possession accompanies and follows the deed, it is fraudulent and void,"² and he went on to say, that this principle had been long settled, and never had been seriously questioned; and took a distinction between bills of sale, which are to take place immediately, and those which are to take place at some future time, on performance of a condition. He then continues: "This has been argued by the defendant's counsel as being a case, in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se*, as makes the transaction fraudulent in point of law; that is the point, which we have considered, and we are

¹ *Edwards v. Harben*, 2 T. R. 587.

² In *Bucknal v. Roiston*, Prec. in Ch. 285, it was stated by one of the counsel, *arguendo*, that it had been ruled forty times, in his experience, at Guildhall, that if a man sells goods, and still continues in possession of them as visible owner, the sale is fraudulent and void, as to creditors.

all of opinion, that if there is nothing but the absolute conveyance, without the possession, that, in point of law, is fraudulent." In subsequent cases the same doctrine has been acted upon, and the case of *Edwards v. Harben* expressly affirmed.¹

§ 533. But this doctrine, that possession of goods, sold under an absolute bill of sale, affords a conclusive presumption of fraud, seems to have been modified in England by the general current of the late cases; and, although there are some cases, which maintain the doctrine of *Edwards v. Harben*, yet the weight of authority preponderates to the modified doctrine, that possession, in these cases, by the vendor, only affords a badge or *prima facie* presumption of fraud. This doctrine was asserted by Lord Eldon, in the case of *Kidd v. Rawlinson*; ² and afterwards, affirmed by him in the case of *Lady Arundell v. Phipps*; ³ on which, referring to his former decision, he said: "The mere circumstance of possession of chattels, however familiar it may be to say it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown, under which the possession has followed." Lord Mansfield, also, held, that possession was only a badge of fraud, and that, whether the circumstances created a necessary presumption of fraud, was a question for the jury.⁴ Lord Tenterden, also, was of opinion, that continued possession was not conclusive evidence of fraud.⁵ And Mr. Justice Parke, in the case of *Martindale v. Booth*,⁶ where there was an as-

¹ *Steel v. Brown*, 1 Taunt. R. 382; *Reed v. Wilmot*, 7 Bing. R. 583; s. c. *Moore & Payne*, 564; *Paget v. Perchard*, 1 Esp. N. P. R. 205; *Wordall v. Smith*, 1 Camp. N. P. R. 332.

² *Kidd v. Rawlinson*, 2 Bos. & Pul. 59.

³ *Arundell v. Phipps*, 10 Vesey, R. 145.

⁴ *Martin v. Podger*, 2 W. Black. R. 701.

⁵ *Eastwood v. Brown*, Ry. & Mood. 312; *Martindale v. Booth*, 3 Barn. & Adolph. 505.

⁶ 3 Barn. & Adolph. 505.

signment of the furniture, household goods, and fixtures of a tavern to secure payment of a debt, with a proviso for the grantee to take possession, on failure of payment of any of the instalments, and sell the property, and that the grantor until then should keep the possession, says: "I think the want of delivery of possession does not make a deed of sale of chattels absolutely void. The *dictum* of Buller, J., in *Edwards v. Harben*, has not been generally considered in subsequent cases to have that import. The want of delivery is only evidence, that the transfer was colorable. In *Benton v. Thornhill*,¹ it was said in argument, that want of possession was not only evidence of fraud, but constitutes it; but Gibbs, Chief J., dissented; and although the vendor, after executing a bill of sale, was allowed to remain in possession, he, at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not." "It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking, that a jury would find fraud here, we might, this being a special case, infer it; but there is no ground whatsoever for saying, that this bill of sale was fraudulent." In this case, however, it will be observed, that the possession was consistent with the terms of the deed, and therefore, it was not fraudulent within the rule of the case of *Edwards v. Harben*. In *Steward v. Lombe*, it was said by Lord Chief Justice Dallas, that "the case of *Edwards v. Harben* has been dissented from often," and by Mr. Justice Park, that "doubts have arisen as to the extent of the doctrine there laid down."² In *Latimer v. Batson*,³ Lord Chief Justice Abbott said, "I perfectly agree, that possession is to be much regarded; but that is with a view to ascertain the good or bad faith of the transaction." "Here the jury have affirmed the good faith of the transaction. The question for their con-

¹ *Benton v. Thornhill*, 2 Marshall, R. 427.

² *Steward v. Lombe*, 1 Brod. & Bing. 512, 513.

³ *Latimer v. Batson*, 7 Dowl. & Ryl. 110. See, also, s.c. 4 Barn. & Cres. 654.

sideration was properly, whether this was a *bonâ fide* transaction, and that fact being ascertained, the subsequent possession was unimportant.”¹ In *Hoffman v. Pitts*,² Lord Ellenborough said, speaking of an assignment of chattels, made without surrender of possession: “The not taking possession, was, in some measure, indicative of fraud; but was not conclusive. But to make it absolutely void, there must be something that showed the deed fraudulent in the concoction of it. It was incumbent on the person claiming title to show, that the transaction was *bonâ fide*.”

§ 534. The conclusion to be drawn from these, and other English cases, asserting a similar doctrine, would, therefore, seem to be, that, by the modern rule, which obtains in England, the mere fact, that there is no change of possession, after an absolute bill of sale has been made, would not, of itself, necessarily constitute such a fraud as to avoid the sale, — but that it is a badge of fraud, which, taken with the other circumstances of the case, may afford a conclusive presumption of fraud, or may be rebutted, and explained, so as to render the sale valid.³ All its effect is to afford a *primâ facie* presumption of fraud.

§ 535. The rule of law applicable to this subject, which obtains in America, is by no means settled, and the question is embarrassed by decisions, which are utterly contradictory and irreconcilable.

¹ *Wordall v. Smith*, 1 Camp. R. 332.

² *Hoffman v. Pitt*, 5 Esp. R. 25.

³ See, also, to this point, *Eastwood v. Brown*, Ry. & Mood. 312; *Baldwin v. Cawthorne*, 19 Ves. R. 166; *Jezeph v. Ingram*, 1 Moore, R. 189; *Benton v. Thornhill*, 2 Marsh. R. 427; s. c. 7 Taunt. R. 149; *Reed v. Wilmot*, 5 Moore & Payne, 553; s. c. 7 Bing. R. 577; *Woodham v. Baldock*, 3 Moore, R. 11; s. c. Gow, R. 35; *Leonard v. Baker*, 1 Maule & Selw. 251; *Watkins v. Birch*, 4 Taunt. R. 823; 2 Kent, Comm. Lect. 39, p. 520; *Hoffman v. Pitt*, 5 Esp. R. 22.

§ 536. In the Supreme Court of the United States, the doctrine of *Edwards v. Harben*, that an absolute bill of sale or conveyance, without surrender of possession, is, of itself, conclusive evidence of fraud, has been affirmed to its full extent. In the case of *Hamilton v. Russel*,¹ Mr. Ch. Justice Marshall, after quoting fully from the case of *Edwards v. Harben*, proceeds to say: "This court is of the same opinion. We think the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented, by declaring that an absolute bill of sale is itself a fraud, unless possession 'accompanies and follows the deed.'" This construction, too, comports with words of the act. Such a deed must be considered as made with an intent "to delay, hinder, or defraud creditors." The same doctrine is affirmed in the circuit court by Mr. Justice Story.²

§ 537. So, also, in the United States courts, it is held, although possession be not given, yet if the bill of sale or conveyance be not absolute, but conditional that the property shall remain in the possession of the vendor until performance of the condition, then the sale would not be fraudulent. So, also, if the bill of sale be, on the face of it, merely by the way of mortgage or security, and pursuant to an agreement between the parties that the mortgagor shall retain possession, it would be valid.³

¹ *Hamilton v. Russel*, 1 Cranch, R. 310. See, also, *Conard v. Atlantic Ins. Co.* 1 Peters, R. 449. See *Bissell v. Hopkins*, 3 Cowen, R. 189, and the cases there collected; *U. States v. Hooe*, 3 Cranch, R. 73.

² *Mecker v. Wilson*, 1 Gallison, R. 419.

³ *Hamilton v. Russel*, 1 Cranch, R. 310; *D'Wolf v. Harris*, 4 Mason, R. 515; *Conard v. Atlantic Ins. Co.* 1 Peters, R. 449; *Mecker v. Wilson*, 1 Gallison, R. 419; *U. States v. Hooe*, 3 Cranch, R. 73; *U. States v. Conyngham*, 4 Dall. R. 358; *Phettiplace v. Sayles*, 4 Mason, R. 321.

§ 538. But the doctrine, which is promulgated in the State courts, differs in the different States. In Massachusetts,¹ Maine,² New Hampshire,³ New Jersey,⁴ Tennessee,⁵ Kentucky,⁶ North Carolina,⁷ Texas,⁸ Arkansas,⁹ and Ohio,¹⁰ we find the later doctrine of the English courts, that possession only affords a *prima facie* evidence of fraud, which may be sus-

¹ Brooks v. Powers, 15 Mass. R. 244 ; Bartlett v. Williams, 1 Pick. R. 288 ; Homes v. Crane, 2 Pick. R. 607 ; Wheeler v. Train, 3 Pick. R. 255 ; Ward v. Sumner, 5 Pick. R. 59 ; Shumway v. Rutter, 7 Pick. R. 56 ; s. c. 8 Pick. R. 443 ; Adams v. Wheeler, 10 Pick. R. 199 ; Marden v. Babcock, 2 Metcalf, R. 99 ; Briggs v. Parkman, 2 Metc. R. 258. In the last case, Mr. Justice Wilde said : " It has always been held by this court, that where a vendor continues in possession of the goods sold, after the sale, with the consent of the vendee, such a possession is only a badge or presumption of fraud, which it is proper to submit to a jury, and which may be explained, and the inference of fraud repelled by other evidence."

² Reed v. Jewett, 5 Greenl. R. 96 ; Holbrook v. Baker, 5 Greenl. R. 309 ; Brinley v. Spring, 7 Greenl. R. 241 ; Ulmer v. Hills, 8 Greenl. R. 326 ; Cutter v. Copeland, 18 Maine, R. 127. In this last case, the courts go so far as to affirm, that a mortgagor may, by an arrangement with the mortgagee, become the agent of the mortgagor, and retain the possession, without affording even *prima facie* evidence of fraud. Bradeen v. Brooks, 22 Maine R. 463.

³ Haven v. Low, 2 N. Hamp. R. 13 ; Coburn v. Pickering, 3 N. Hamp. R. 415 ; Lewis v. Whittimore, 5 N. Hamp. R. 364 ; Ash v. Savage, 5 N. Hamp. R. 545 ; Kendall v. Fitts, 2 Foster, 1 ; Coburn v. Pickering, 3 N. Hamp. R. 415.

⁴ Sterling v. Van Cleve, 7 Halst. R. 285 ; Bank of New Brunswick v. Hasserst, Saxton, N. J. Ch. R. 1 ; Mount v. Hendricks, 2 South. R. 738 ; Cumberland Bank v. Hann, 3 Harrison, N. J. R. 122.

⁵ Callen v. Thompson, 3 Yerg. R. 475 ; Maney v. Killough, 7 Yerg. R. 440 ; Mitchell v. Beal, 8 Yerg. R. 141.

⁶ Baylor v. Smithers, 1 Littell, R. 112 ; Goldsbury v. May, 1 Littell, R. 256 ; Hundley v. Webb, 3 J. J. Marshall, R. 643 ; Breckenbridge v. Anderson, 3 J. J. Marsh. R. 710 ; Allen v. Johnson, 4 J. J. Marsh. R. 235 ; Woodrow v. Davis, 2 B. Monroe, R. 298 ; Wash v. Medley, 1 Dana, 269.

⁷ Howell v. Elliot, 1 Dev. 76 ; Vick v. Kegs, 2 Haywood, R. 125 ; Falkner v. Perkins, 2 Haywood, R. 224 ; Smith v. Niel, 1 Hawks, R. 341 ; Trotter v. Howard, 1 Hawks, R. 320.

⁸ Bryant v. Kelton, 1 Texas, 415.

⁹ Field v. Simco, 2 Eng. 269.

¹⁰ Barr v. Hatch, 3 Ham. R. 529 ; McLean v. Lafayette Bank, 3 McLean R. 587.

tained, or rebutted, by proof of the other circumstances of the case. In South Carolina, the doctrine has been subject to fluctuations, but this doctrine seems also to obtain there now.¹ But in Virginia,² Pennsylvania,³ Vermont,⁴ Illinois,⁵ Flori-

¹ In the case of *Croft v. Arthur*, 3 Eq. R. S. C. 229, the strict rule as to the effect of possession was said to be better founded. In *De Bardeleben v. Beekman*, 1 Eq. Rep. S. C. 346, the court held, that if possession did not accompany an unrecorded bill of sale of chattels, it was void as to the creditors, although there was no doubt of the fairness of the transaction. Again, in *Kennedy v. Ross*, 2 Const. S. C. R. 125, the doctrine of *Edwards v. Harben* was affirmed. But in *Terry v. Belcher*, 1 Bailey, S. C. R. 568, and *Howard v. Williams*, 1 Bailey, S. C. R. 575, and *Smith v. Henry*, 2 Bailey, S. C. R. 118, the relaxed doctrine, that possession constitutes only *prima facie* evidence of fraud, was enunciated. But see again, *Anderson v. Fuller*, 1 McMullan, R. 27.

² *Alexander v. Deneale*, 2 Munf. R. 341; *Robertson v. Ewell*, 2 Munf. 1; *Land v. Jeffries*, 5 Randolph, R. 211; *Claytor v. Anthony*, 6 Randolph, R. 75; *Sydnor v. Gee*, 4 Leigh, R. 535.

³ *Young v. McClure*, 2 Watts & Serg. 147; *Clow v. Woods*, 5 Serg. & Rawle, 285; *Welsh v. Hayden*, 1 Penn. R. 57; *Cowden v. Brady*, 8 Serg. & Rawle, 510; 2 Kent, Comm. Lect. 39, p. 522, 523, 524; *Brady v. Haines*, 18 Penn. St. R. 113.

⁴ *Boardman v. Keeler*, 1 Aik. Verm. R. 158; *Mott v. McNiell*, 1 Aik. Verm. R. 162; *Weeks v. Wead*, 2 Aik. Verm. R. 64; *Fletcher v. Howard*, *Ibid.* 115; *Beattie v. Robin*, 2 Verm. R. 181; *Judd v. Langdon*, 5 Verm. R. 231; *Hutchins v. Gilchrist*, 23 Verm. R. 82; *Farnsworth v. Shepard*, 6 Verm. R. 521. In this case, Mr. Justice Mattock said: "This still remains the settled law of the land; and although some learned gentlemen have supposed the court would eventually retrace their steps, as the courts in some neighboring States have done, that is, leave that as a badge of fraud to a jury, yet we are not disposed to recede a jot, nor to advance a whit, but to remain stationary upon this, in other governments, vexed question, so as to give this branch of the law, at least the quality of uniformity." See *Wilson v. Hooper*, 12 Verm. 653; *Stiles v. Shumway*, 16 Verm. R. 435.

⁵ *Thornton v. Davenport*, 1 Scammon, R. 296. In this Illinois case the true doctrine is laid down with precision. "All conveyances, it is held, of goods and chattels, where the possession is permitted to remain with the donor or vendor, are fraudulent *per se*, and void as to creditors and purchasers, unless the retaining of possession be consistent with the deed: where the transaction is *bonâ fide*, and from the nature and provisions of the deed, the possession is to remain with the vendor, that possession being consistent with

da,¹ and Connecticut,² the strict rule of the old English law and of the United States courts is adhered to. In New York, the doctrine has not been wholly settled, although it seemed to preponderate in favor of the rule declared in the United States courts, that possession constitutes a conclusive presumption of law.³ This question is, however, now set at rest in that State

the deed, does not avoid it; and therefore mortgages, marriage settlements, and limitations over of chattels, are valid without transfer of possession, if the transfer be *bonâ fide*, and the possession remain with the person according to the deed. But an *absolute* sale of personal property, and the possession remains with the vendor, is void as to creditors and purchasers, *even though authorized by the terms of the bill of sale*. The opinion of one of the judges in that case went to the whole length of the salutary doctrine, that the mortgagee or vendee taking a bill of sale for security, must take possession, even though the arrangement in the deed or mortgage be different, because the policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner."

¹ Gibson v. Love, 4 Florida, 217.

² Patten v. Smith, 5 Conn. R. 196; Swift v. Thompson, 9 Conn. R. 63; Toby v. Reed, 9 Conn. R. 216; Mills v. Camp, 14 Conn. R. 219; Osborne v. Tuller, 14 Conn. 529.

³ In Sturtevant v. Ballard, 9 Johns. R. 337, it was held by Mr. Justice Kent, that if the vendor be permitted to retain possession in the case of an absolute bill of sale of chattels, it was an act of fraud in law, as against creditors, and that, though the agreement appear on the face of the deed, it would be equally so, unless some good motive at the same time was shown. The rule applied equally to conditional as to absolute sales, unless the intent of the party, in creating the condition, was sound and legal. The result of the case was, that a voluntary sale of chattels, with an agreement either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown and approved of by the court, fraudulent and void as against creditors. In Ludlow v. Hurd, 19 Johns. R. 221, however, the question, whether possession constituted a presumption of fraud, or proof thereof, was left as a debatable point. And in Bissell v. Hopkins, 3 Cowen, R. 166, the doctrine of Sturtevant v. Ballard was entirely overthrown, and the doctrine asserted, that possession was merely evidence, and not proof of fraud. And see Thompson v. Blanchard, 4 Comst. R. 303. But in Diver v. McLaughlin, 2 Wend. R. 596, the doctrine of Sturtevant v. Ballard was again recognized. See also Collins v. Brush, 9 Wend. R. 198.

by a statute, declaring, that unless a sale or assignment be accompanied by an immediate delivery, and be followed by an actual and immediate change of possession, it shall be presumed to be fraudulent and void, as against the creditors, &c., and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such assignment, that the same was made in good faith, and without any attempt to defraud.¹

¹ N. Y. Revised Stat. vol. 2, p. 136, § 5, 6, 7. It is also enacted that the question of fraudulent intent, in all cases of fraudulent conveyances and contracts, shall be deemed a *question of fact*, and *not of law*. See *Cunningham v. Freeborn*, 11 Wend. R. 240⁴; *Doane v. Eddy*, 16 Wend. R. 523; *Randall v. Cook*, 17 Wend. R. 53; *Smith v. Acker*, 23 Wend. R. 653; *White v. Cole*, 24 Wend. R. 116; *Butler v. Van Wyck*, 1 Hill, R. 438; *Cole v. White*, 26 Wend. 511; *Hanford v. Arther*, 4 Hill, R. 271, in which, nevertheless, this question was subjected to much change of opinion, and which may finally be considered as settled in the jurisprudence of New York by the two latter cases. Mr. Chancellor Kent, (2 Kent, Comm. Lect. 39, p. 539, note *c.*) after reviewing all the cases, says, "And it may now be considered as finally settled in the jurisprudence of New York, and as the true doctrine of the Revised Statutes, that leaving the possession of chattels, on sale, or mortgage, or assignment, in the hands of the vendor, or mortgagor, or assignor, is only presumptive evidence of fraud, and it rests with the defendant to rebut that presumption as a matter-of-fact, by showing proof of good faith, and an honest debt, and an absence of an intent to defraud. The doctrine of the supreme court was, that there must appear to have been good and sufficient reasons, or some satisfactory excuse, for non-delivery at the time, and that the presumption of fraud cannot be rebutted merely by proving good faith and absence of a fraudulent intent. The old doctrine was, that non-delivery, except in special cases, was fraudulent, and an inference of law for the court. The doctrine now finally settled in the senate is, that the whole is a question of fact for a jury. The chancellor (Walworth) and the supreme court have struggled nobly to maintain what I believe to be the only safe and salutary principle requisite to protect creditors and bar fraud. The senate have established, upon the letter of the Revised Statutes, the more lax and latitudinary doctrine, which places the most common and the most complex dispositions of *property*, as between debtor and creditor, at the variable disposal of a jury. The president of the senate (Bradish) gave a learned historical review of the English and American authorities, and ably vindicated the

§ 539. Again, it is considered a fraud against the rights of third persons secretly to employ by-bidders, or puffers, whose sole office is to excite competition and inflate the price by fictitious bids in sales at auction, while, by a secret understanding with the auctioneer or seller, that they shall not be held by their bids, they avoid all risk. And in respect to such persons, the rule is, that if their false bidding operate directly as a fraud upon the vendee, the latter may avoid the purchase.¹ If, therefore, all of the bidders except the purchaser be fictitious bidders, or if the bid immediately preceding that of the purchaser be made by a puffer, the buyer may avoid the sale; for it is evident, that, as he has purchased under the false supposition that he is contending with real bidders, he has been deceived wilfully and injuriously, and the very condition of an auction sale, which is, that the highest real bidder shall take the subject-matter, is broken. But if a person be employed merely to bid up the subject-matter of sale to a certain price, in order to prevent a sacrifice of the property, and the price be afterwards raised by real bidders, after one of whose bids the purchaser makes the last bid, the sale will be valid, because there has been no fraud in purpose, and no damage or fraud in fact.² Again, the vendor may employ puffers and by-

decision of the senate." See *McVicker v. May*, 3 Barr, R. 224; *Jordan v. Brackenridge*, 3 Barr, R. 442.

¹ *Bramley v. Alt*, 3 Ves. Jr. 624; *Veazie v. Williams*, 3 Story, R. 620; *Wheeler v. Collier*, Mood. & Malk. 125; *Howard v. Castle*, 6 T. R. 642; *Bexwell v. Christie*, Cowp. R. 396; *Smith v. Clarke*, 12 Ves. Jr. 477; *Crowder v. Austin*, 3 Bing. R. 368; *Sugden on Vend.* 18, 19; *Conolly v. Parsons*, 3 Ves. 625, note. See *Towle v. Leavitt*, 3 Foster, 360, an able case on this subject. *Staines v. Shore*, 16 Penn. St. R. 200.

² The rule of law, applicable to this class of cases, is far from being distinctly settled. The cases are quite contradictory, and cannot be harmonized; but the weight of doctrine seems to be, upon the whole, the rule propounded in the text. The first case, in which the question as to the effect of puffers at an auction sale, came before the court, was in *Bexwell v. Christie*, Cowp. R. 396, in which Lord Mansfield held the practice to be a fraud upon the buyer and on the public. "The question then is," said he, "whether the owner can *privately* employ another person to bid for him. The basis of all dealings

bidders, if he give notice of such fact at the time of the sale, since, in such case, it would not operate as a fraud.¹

ought to be good faith; so more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder: that could never be the case, if the owner might secretly and privately enhance the price, by a person employed for that purpose; yet tricks and practices of this kind daily increase, and grow so frequent, that good men give into the ways of the bad and dishonest in their own defence. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale, and upon the public. The disallowing it is no hardship upon the owner. For if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, and not lower; such a direction would be fair." This case is recognized and the same rule adopted by Lord Kenyon, in *Howard v. Castle*, 6 T. R. 643, in which he says: "I will not go into the general reasoning on this subject, because it is very ably stated by Lord Mansfield in the case alluded to. Only part of that reasoning has now been adverted to by the plaintiff's counsel, but the rest of it is applicable to this case. The whole of that reasoning is founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man. The acts of parliament that have been referred to did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. In the case cited, Lord Mansfield mentioned an instance in which the owner may legally and fairly bid at the auction, namely, where, before the bidding begins, he gives public notice of his intention; and in such a case no duty is to be paid under the acts of parliament that have been referred to. The circumstance of puffers bidding at auctions has been always complained of: if the first case of this kind had been tried before me, perhaps I should have hesitated a little before I determined it; but Lord Mansfield's comprehensive mind saw it in its true colors, as founded in fraud; he met the question fairly, and made a precedent which I am happy to follow." But Lord Rosslyn, in *Conolly v. Parsons*, 3 Ves. R. 625, note, questions the soundness of this opinion, and doubts whether "the judgment of one person is deluded and influenced by the bidding of others." He says: "This point comes now before me very much by surprise. I should not have thought the case decided by Lord Mansfield, bore much upon it.

¹ *Wheeler v. Collier*, Mood. & Malk. 125; *Crowder v. Austin*, 3 Bing. R. 368; *Oldfield v. Round*, 5 Ves. R. 508. See *Latham v. Morrow*, 6 B. Monroe, 630; *Thornett v. Haines*, 15 M. & W. 371. Post, § 548.

§ 540. If, however, either the owner of the goods sold at auction, or the auctioneer himself, be innocent of the fraud,

The last case carries a great degree of authority with it; but I fancy it turned upon the circumstance that there was no real bidder, and the person refused instantly. It was one of those trap auctions that are so frequent in this city. The reasoning goes large certainly; and does not at all convince me. I should wish it to undergo a reconsideration; for if it is law, it will reduce every thing to a Dutch auction, by bidding downwards. I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the bidding of others. It may weigh, if A., a skilful man, B., a cautious man, and C., a wealthy man, are in competition; but where it is publicly known that persons are employed to bid, it would be very foolish in any one to let himself be so influenced."

"I have seen public advertisements of lots put up again as lots bought in for the owner. If it is considered as a contract with all the world, he cannot countermand the sale and sell by private contract. They meet upon these terms; the seller has fixed the value in his own mind, but hopes to get more; the buyer has done the same, but hopes to get it for less. They stand entirely equal. If it is unfair for the seller to get more, it is equally unfair for the buyer to get it for less. It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody for the seller. The buyer goes to the sale with this knowledge, that he shall not get the article under a price the seller thinks to be a reasonable price. There are several articles sold almost always by auction, that could not possibly be sold so, if the vendor was not allowed somebody to look after his interest. There are not above three or four purchasers of scarce and valuable books; they would divide them, if the person selling has not some means of guarding against that. I should be extremely glad to find any case that would draw into consideration what might be all the consequences of applying that philosophical doctrine, as I call it, to sales by auction. It goes no further in point of authority than when the purchaser declares off immediately." So, also, Sir William Grant, in *Bramley v. Alt*, 3 Ves. R. 622, limits the rule to cases, where all the bidders, except the purchaser, are puffers. This case was one, where one person only bid for the vendor at £75 per acre, and then, afterwards, in a contest of real bidders among themselves; the estate was run up to £100 17s. an acre, and this was held not to avoid the sale. In the opinion, he says: "It is contended, as a point established by *Howard v. Castle*, 6 Term Rep. 642, that neither courts of law nor of equity will support this sale. I have looked into that case, which was relied upon at the trial, and is the only defence set up against the performance of this agreement. Upon that case,

and do not know that sham-bidders are employed, he will not be liable to an action by the buyer; but the remedy of the latter

there is no doubt that no man shall be compelled to abide by such a bargain; no person being present but the buyer and the persons bidding on behalf of the seller; and in consequence of his zeal he was induced to bid; thinking he was bidding against real purchasers. The judges were of opinion that it was a mere fraud upon him as a purchaser; that a man going to an auction has a right to expect that he is bidding against real purchasers. He may be induced upon that supposition, which he has a right to make, to give as much as any man will for himself; and if he is induced to bid by that method, he has been the dupe of a fraud. I perfectly subscribe to that; but is this a case of that complexion; and am I to understand that, if at any sale any one person bids for the seller without having declared it, though he ceased to bid, and the purchaser pursued his bidding against *bonâ fide* bidders, he shall, from the mere circumstance of that one person bidding for the seller, avail himself of that to put an end to his contract? I can collect no such thing; and should be sorry that was to prevail. On the contrary, I see it expressly stated, that no other persons were present but those who bid on the part of the seller. I am told the Lord Chancellor, in a late case, intimated that he could not consider himself bound to hold that the purchaser could refuse to abide by the contract, because there were persons who bid for the seller. I do not know whether his lordship gave any opinion. I have no doubt that if there were none but puffers, and a person was induced by that method to give more than the value, neither courts of law nor of equity would support it. I was amazed to find no witnesses were examined for the defendant; but it now appears that the reason which induced his counsel very properly not to call any, thinking it would be in vain, was, that several days afterwards he confirmed the sale, by paying part of the auction duty; which he states by his answer he was rather inveigled into. The fact is, that at the sale one person was authorized to bid for the seller as far as seventy-five guineas; and did so. It is said that ought to have been proclaimed. No doubt a man may buy in an estate; for the statutes authorize the auctioneer not to pay the duty if it is bought in; but it is said that ought to be an open declared thing. Where is the difference between that and setting it up at seventy-five guineas? The judge's report shows this fictitious bidder did not induce him to go on; for afterwards began the contest between him and Mills, who swears he was a real bidder. Can I say the defendant was induced by the fraud of the seller to bid what he would not have given if he had not been so induced? Therefore, without impugning the authority of that case, to which as stated I perfectly subscribe, I am clearly of opinion that no fraud was practised upon the defendant; that he was bidding at a fair sale, and became the purchaser; and

must be against the party committing the fraud, whether he be the sham-bidder, or the owner, or the auctioneer.¹

I do not believe the judges meant that if one person was bidding for the seller, that shall vitiate the bargain, if under all the circumstances that does not operate as a fraud upon the buyer. This contract, therefore, ought to proceed." In *Smith v. Clarke*, 12 Ves. R. 481, Sir W. Grant held, that, where a person was employed to bid up to a certain sum to prevent a sacrifice of the property, the purchaser was bound by the sale, though the bid immediately previous to the last bid was made by the puffer. This relaxation of doctrine is approved of in *Steele v. Ellmaker*, 11 Serg. & Rawle, 86; and in *Jenkins v. Hogg*, 2 Const. R. 821; and in *Wolfe v. Luyster*, 1 Hall, R. 146. But in the late case of *Crowder v. Austin*, 3 Bing. R. 368, the doctrine of Lord Mansfield, in *Bexwell v. Christie*, is adopted. In this case, the plaintiff sought to recover the price of a horse sold to him by the defendant at a public auction, one condition of which auction was, that the horse should be sold to the best bidder. The defendant resisted the contract on the ground, that after a *bonâ fide* bidder had bid £12, a servant of the plaintiff's, stationed by him at the auction, made repeated biddings up to £23, and it was held by the whole court, that the transaction was a fraud, which vitiated the sale, and that the doctrine of Lord Mansfield was the correct one.

In the still later case of *Veazie v. Williams*, 3 Story, R. 624, the doctrine stated in the text was held by Mr. Justice Story. In this case certain mill privileges were sold at auction, and the auctioneer made sham-bids, by which the price was greatly enhanced; but as the action was brought against the seller, who had never authorized the sham-bidding of the auctioneer, the case was not decided simply on the ground of fraud. In the opinion delivered by Mr. Justice Story in this case, after reviewing the cases on this subject, he said: "It appears to me, that there is room for some distinctions upon this subject, which if they do not fully reconcile the cases, are at all events well adapted to subserve the purposes of private justice and convenience, as well as public policy. Where all the bidders at the sale, except the purchaser, are secretly employed by the seller, and yet are apparently real bidders, and the purchaser is misled thereby, and is induced to give a larger price in consequence of their supposed honesty and exercise of judgment, there the sale ought to be held a fraud upon the purchaser, because he has been intentionally deluded by them. But where there are real bidders, as well as secret bidders for the sellers, there, if the last bid before the purchaser's bid be a real bid, and no intentional deceit has been practised by what have been sometimes called decoy ducks, to mislead or surprise the judgment or discretion

¹ *Veazie v. Williams*, 3 Story, R. 620.

either of other real bidders or of the purchaser, there seems to be a solid ground to hold that the sale is valid, and for the very reasons stated by Lord Loughborough and Lord Alvanley. It seems to me, that Sir William Grant, in *Smith v. Clarke*, 12 Ves. R. 477, 482, has pointed out the true line of distinction in his comments upon the cases; and although he did not then express any positive opinion, it is sufficiently evident what his opinion was — an opinion entitled to very great weight, for he was among the ablest judges that ever graced the courts of equity of England. He there said: ‘After the case of *Bramley v. Alt*, and what Lord Rosslyn stated to be his strong and clear opinion in *Conolly v. Parsons*, it would be too much for me to say, this is in itself a fraud; unless I could say, every direction by a vendor to any person to bid in his behalf, is of itself such a fraud as to vitiate every agreement that takes place at an auction, at which that direction is given. In *Bexwell v. Christie*, very general and broad principles are laid down by the Court of King’s Bench; beyond any, that the case immediately before the court, required. The subsequent case, *Howard v. Castle*, proceeded upon the ground of plain and direct fraud; Lord Kenyon, stating, that it appeared at the trial to be bottomed in fraud; that it was fraud from beginning to end. There was no real bidder; and there were several bidders for the vendors. Whenever I shall be able to state the same proposition of any case, I shall come to the same conclusion. But it is clear, Lord Kenyon had not always entertained the same opinion as to the doctrine in *Bexwell v. Christie*; for in *Twining v. Morrice*, he states, with respect to bidders being employed for the vendors, that he does not say the doctrine in *Bexwell v. Christie* is wrong; but everybody knows that such persons are constantly employed. In *Bramley v. Alt*, Lord Alvanley expresses his opinion, that it is perfectly legal for a man to state a price, below which he would not permit a sale; and his Lordship observes, that there is no difference between setting up the lot at a given price, and employing a person to prevent a sale under that price; if that is communicated. I do not mean to state a proposition so general, as that there can be no fraud through the medium of persons employed by the vendors. Lord Rosslyn appears in *Conolly v. Parsons*, to doubt, whether there can be that species of fraud: whether, in any case, the purchaser can be said to be defrauded merely by being drawn in through eagerness of zeal and competition with others. I do not go that length; for if the person is employed, not for the defensive precaution, with a view to prevent a sale at an undervalue, but to take advantage of the eagerness of the bidders to screw up the price, I am not ready to say, that it is such a transaction as can be justified in a court of equity. Neither do I say, that, if several bidders are employed by the vendor, that in such a case a court of equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It is not necessary for the defensive purpose of protection against a sale at an undervalue. I leave those cases to be determined upon those grounds whenever they may occur.

It is sufficient to say, this is not a case of that description. These plaintiffs had not a fraud in contemplation; and were not in a situation that made it peculiarly incumbent upon them to take care not to permit a sale at an under-value.' Mr. Chancellor Kent, in his learned Commentaries, (vol. 2, pp. 538, 539, 5th ed.) seems to me to have arrived at the true and just and satisfactory result. 'It would seem,' says he, 'to be the conclusion, from the latter cases, that the employment of a bidder by the owner would or would not be a fraud, according to circumstances tending to show innocence of intention, or a fraudulent design. If he was employed *bonâ fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner, to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner, to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. So it will be a void sale, if the purchaser prevails on the persons attending the sale to desist from biddings, by reason of suggestions by way of appeal to the sympathies of the company.' But, be the general doctrine upon this subject as it may, no case has fallen under my notice, in which it has been held, that the act of the auctioneer in receiving or making false bids, unknown and unauthorized by the seller, would avoid the sale. And upon principle, it is very difficult to see, why it should avoid the sale, since there is no fraud, connivance, or aid given by the seller to the false bids. If the purchaser is misled by the false bids of the auctioneer to suppose them to be real, he may have an action against the auctioneer for the injury sustained thereby. But what has the innocent man to do with such a transaction; which he has, in no sense sanctioned?" See also *Rex v. Marsh*, 3 Younge & Jerv. 331; 1 Story, Eq. Jurisp. § 245, and note. So, also, Mr. Chancellor Kent, in his Commentaries, lays down the rule, that "in sound policy, no person ought, in any case, to be employed secretly to bid for the owner against the *bonâ fide* bidder at a public auction. It is a fraud on the very face of the transaction." 2 Kent, Comm. Lect. 39, p. 539. See, also, *Baham v. Bach*, 13 Louisiana R. 287. In *Twining v. Morrice*, 2 Bro. Ch. R. 326, a specific performance was refused upon the ground, that the solicitor of the seller was present, and bid, although he, in reality, did not bid for the seller. See the remarks on that case in *Ex parte Lacey*, 6 Ves. R. 629, and *Townshend v. Stangroom*, 6 Ves. R. 338. See, also, the note (b) to Perkins's edition of 2 Brown's Ch. R. 331. The actual by-bidding by puffers, can, as it would seem, only operate upon the buyers as a deceit, or fraud, or surprise, and must always, if it have any influence, be injurious to their interests. The doctrine of Lord Mansfield seems to us to be founded in principle, and to create no practical difficulty; the only objection, that has been offered to it, namely, is, that it might lead to a sacrifice of goods for less than their value, can be easily obviated by the precautions which he recommends, of setting

them up at certain upset price. - This rule is also upheld in the Scottish law. In *Anderson v. Stewart*, (16 Dec. 1814,) it was held, that a sale made, where puffers were employed, could not stand. In this case, Lord Glenlee said: "There is good ground for complaint when the price has been raised by unreal and fictitious offers, for, notwithstanding it is said that a person ought to judge for himself, yet he is entitled to redress if any such improper means are used to draw him on. At the same time, this is a very delicate question. A person going to a public sale, takes his chance of biddings being made out of frolic, or out of malice, by persons who have no desire to purchase, but, as they run the risk of the property falling in their hands, he must just take his chance of such things. That, however, is a different case from offers which are altogether fictitious, for against any thing of that kind the purchaser is entitled to redress; and I think the offers here were fictitious." In *Gray v. Stewart and others*, (7th Aug. 1753,) the same doctrine was held, and in the judgment of the court, it is said: "the person who advertises a sale by auction, pledges his faith to the public, that he is to sell to the highest bidder, and is not to buy for himself. In this case the pursuer was really the highest offerer, seeing the offer of a white bonnet is no offer at all." See, also, *Cicero de Officiis*, l. 3; *Huber, Prælectiones*, xviii. 2, 7. See, however, *Moncrieff v. Goldsborough*, 4 Harr. & McHenry, 282; *Donaldson v. M'Roy*, 1 P. A. Browne, R. 346; *Morehead v. Hunt*, 1 Dev. Eq. R. 35.

CHAPTER XIX.

ILLEGAL CONTRACTS.

§ 540 *a*. HAVING considered the subject of Contracts which are void on account of Fraud, we now come to the consideration of contracts which are void either for immorality or because they contravene some rule of public policy. And in the first place as to contracts which the law repudiates on the ground of immorality.

§ 541. All contracts in violation of morality, and founded upon considerations *contra bonos mores*, are void. All duties enjoined by the divine law are not enforced, indeed, by the common statute or law, not only because its forms and modes of proceeding do not enable it to adjust nice questions of morals, but because strict rules as to ethical questions would tend to destroy freedom of opinion, and to afford opportunities for persecution. But no agreements to do acts, forbidden by the law of God, or which are manifestly in furtherance of immorality, and tend to contaminate the public mind, are tolerated, or can be enforced by the common law. Thus, all contracts, whether they be by parol, or under seal, to pay a certain sum, on consideration of future illicit intercourse, (*premi-um pudoris et pudicitia*,) are utterly void. The general maxim is, *Ex turpi contractu non oritur actio*.¹ But a sealed

¹ Fonbl. Eq. B. 1, ch. 4, § 4, and notes; 1 Story, Eq. Jur. § 296; Walker v. Perkins, 3 Burr. R. 1568; s. c. 1 W. Black. R. 517; Franco v. Bolton, 3

contract, made in consideration of past seduction and cohabitation, or past cohabitation without seduction, can be enforced; not merely because it is binding in honor and conscience, for such a reason is not legally sufficient; but because a specialty imports a consideration, which, if not unlawful, both parties thereto are estopped from denying.¹ The reason why a different rule obtains in the last two mentioned classes of cases seems to be, that, in the former class, the contract is executory, or continuing, and to permit it, would be to offer a premium for future unchastity; but in the latter class, the contract being executed, the injury is done, and may otherwise be remediless; and there is no principle of law which forbids a party to redress a past injury, or atone for a wrong which he has already committed.² If the consideration be illegal, the contract may be avoided by a proper plea, even though it be a specialty, and the illegality be not apparent on the face of the instrument.³ A parol contract, however, made upon the consideration of future illicit intercourse, or of past illicit intercourse, is void;⁴ for the consideration is merely moral, and is executed.

§ 542. So, also, a lease of lodgings for the purposes of prostitution, is void.⁵ And the same rule governs in cases of con-

Ves. Jr. 368; *Gray v. Mathias*, 5 Ves. 286; *Matthews v. L——e*, 1 Madd. R. 558; *Clarke v. Periam*, 2 Atk. 333; *Binnington v. Wallis*, 4 B. & Ald. 650; 1 Pothier on Obligations, 23; 2 Ib. 2; Co. Litt. 206 b; *Coolidge v. Blake*, 15 Mass. 429; *Hall v. Palmer*, 3 Hare, R. 532.

¹ *Whaley v. Norton*, 1 Vern. R. 483; *Matthew v. Hanbury*, 2 Vern. 187; *Spicer v. Hayward*, Prec. Ch. 114; *Annandale v. Harris*, 2 P. Wms. 432; *Cray v. Rooke*, Cas. Temp. Talb. 153; *Turner v. Vaughan*, 2 Wils. 339.

² *Binnington v. Wallis*, 4 B. & Ald. 650.

³ *Collins v. Blantern*, 2 Wils. R. 341, 347; Com. Dig. Pleader, 2 W. 18, 23, 25, 26, 27.

⁴ *Matthews v. L——e*, 1 Madd. R. 558; *Binnington v. Wallis*, 4 Barn. & Ald. 650; *Beaumont v. Reeve*, 8 Adolph. & Ell. (N. S.) 483; *Jennings v. Brown*, 9 Mees. & Welsb. 496; *Eastwood v. Kenyon*, 11 Adolph. & Ell. 438.

⁵ *Girardy v. Richardson*, 1 Esp. R. 13; *Binnington v. Wallis*, 4 Barn. &

tracts for clothes, or board and lodging, the price of which is to be paid out of the profits of prostitution. But the mere fact, that the person to whom board and lodging, or any articles are furnished, is a prostitute, does not invalidate the contract therefor, unless the very object of the agreement be to pander to her prostitution.¹ So, also, a contract for the printing or sale of obscene or libellous books and prints is void.² And if such books or prints be seized in compliance with an order therefor, the seller cannot recover the price.³ So, also, it is a good defence to an action for not supplying manuscript according to agreement, that the matter of the work is libellous and immoral.⁴

§ 543. Yet where a contract, founded upon an immoral consideration, has been executed, neither law nor equity will interfere to set it aside, if both persons have been equally in fault. In such cases the legal maxim, *In pari delicto, potior est conditio defendentis*, applies. Thus, where money has been paid in consideration of an immoral act, as for instance, of past illicit intercourse, it cannot be recovered, if both parties were equally criminal.⁵

Ald. 650; *Dyett v. Pendleton*, 8 Cow. 727, 737. See *Commonwealth v. Harrington*, 3 Pick. 29, 30.

¹ *Bowry v. Bennet*, 1 Camp. 348; *Williamson v. Watts*, Id. 553; *Lloyd v. Johnson*, 1 Bos. & Pul. 340; *Crisp v. Churchill*, 1 Bos. & Pul. 340.

² *Fores v. Johnes*, 4 Esp. R. 97; *Poplett v. Stockdale, Ry. & Mood*. R. 337.

³ *Ibid.*

⁴ *Gale v. Leckie*, 2 Stark. R. 107.

⁵ This doctrine, though well established in law, long veered about with the opinions of the various equity judges, and relief was often afforded upon no very well considered ground. The modern rule, however, leaves the parties where it finds them, and affords no relief upon any contracts, tainted with immorality. 1 Story, Eq. Jurisp. § 296 to § 298, § 303, and cases cited; *Smith v. Bromley*, Doug. 697; *Vandyck v. Hewett*, 1 East, R. 96; *Howson v. Hancock*, 8 T. R. 575; *Tomkins v. Bernet*, 1 Salk. 22; *Collins v. Blantern*, 2 Wils. 347; *Lowry v. Bourdieu*, Doug. 468. See also *Inhabitants of Worcester v. Eaton*, 11 Mass. 375; *Phelps v. Decker*, 10 Mass. 267, 274; *Buller*, N. P.

§ 544. A distinction, however, is to be made between those cases, in which one of the parties has, by an illegal act, taken advantage of the other, or imposed upon him, and those cases in which both parties have been equally in fault. This distinction obtains in cases of usurious contracts, wherein it is considered, that the lender has availed himself of the necessities or urgencies of the borrower, to extort from him an unlawful rate of interest; and action for money had and received, will therefore lie for the excess paid beyond principal and lawful interest.¹

CONTRACTS IN VIOLATION OF PUBLIC POLICY.

§ 545. We now come to the third class of Illegal Contracts, namely, — Contracts which violate the rules of public policy. The rule of law, applicable to this class of cases, is, that all agreements which contravene the public policy are void, whether they be in violation of law or of morals, or tend to interfere with those artificial rules, which are supposed by the law to be beneficial to the interests of society, or obstruct the prospective objects, flowing indirectly from some positive legal injunction or prohibition.²

131, 133. See Immoral Consideration, ante, § 541; *Morgan v. Groff*, 4 Barb. S. C. R. 524.

¹ 3 Story on Eq. Jurisp. § 296 to § 303. Lord Mansfield, in *Smith v. Bromley*, Doug. 695, says: "If the act is immoral in itself, or a violation of the general laws of public policy, there the party paying shall not have this action [to recover back the money]; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between the violation of the one sort, and the other." *Id.* p. 697; *Astley v. Reynolds*, 2 Str. 916; *Browning v. Morris*, Cowper, 790; *Vandyck v. Hewitt*, 1 East, 98; *Inhabitants of Worcester v. Eaton*, 11 Mass. 376, 377.

² 1 Story, Eq. Jurisp. § 294 to § 305.

§ 546. Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy.

§ 547. The enlargement of trade and the growth of cities, with the new and various relations created thereby, have rendered many species of contracts valid, which were formerly considered to conflict with public policy. For instance, Fore-stalling, which is the buying and contracting for any merchandise or victual on its way to the market, or dissuading persons from bringing their provisions there, — Regrating, which is the buying of corn and dead victual in any market, and reselling it within four miles of the place where it is bought, — and Engrossing, which is the purchasing of large quantities of dead victual or corn, to sell again, — all of which were formerly considered to be against public policy, when trade was small, and money scarce, and markets few, constitute, at the present day, great arteries of commerce, and are the very form and pressure of certain branches of trades. Indeed, without them, what would become of wholesale commission merchants and jobbers?

§ 548. A general example of a contract against the public policy of the present day is to be found in a confederation or combination of persons for the purpose of preventing competition at an auction sale, and of depressing the price of the property below its fair market value. Thus, if two or more persons should agree not to bid against each other at auction, but that one should bid, and then divide with the others the subject-matter of sale, the agreement would be void, on the

ground that it tends injuriously to affect the character and value of sales at auction.¹ But if the association of bidders be formed for honest and just purposes, and do not conflict with the rights and interest of the seller,—as, if it be for the purpose of enabling them to purchase together, what they could not purchase separately,—their agreement will be valid, as being no fraud on the public, while it is a positive advantage to the seller. It must, in such cases, be clearly proved, that the association was for honest and just purposes, and did not operate as a fraud, or any agreement between the parties not to bid against each other, will be void.² So, also, two or more persons may agree together to purchase property sold at auction and fix the price which they are willing to give, and appoint one of their number to bid for them; for such an agreement could operate to the injury of no one.³ But an agreement by a turnpike corporation, to grant to certain individuals the privilege of passing the gate free from toll, in consideration of their withdrawing their opposition to a legislative act, touching the alteration of the road, has been held to be void, as being prejudicial to fair and unbiased legislation.⁴

¹ Ante, § 518; 1 Story, Eq. Jurisp. § 293 to § 302; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johnson, 112; *Jones v. Caswell*, 3 Johns. Cas. 29; *Toler v. Armstrong*, 4 Wash. C. C. R. 297; 11 Wheat. 258; *Gardiner v. Morse*, 25 Maine R. 140.

² *Phippen v. Stickney*, 3 Metcalf, R. 384, 387; *Smull v. Jones*, 1 Watts & Serg. 128; *Smith v. Greenlee*, 2 Dev. R. 126; *Wolfe v. Luyster*, 1 Hall, R. 146; *Jenkins v. Hogg*, 2 Const. S. C. R. 821. In New York, however, this distinction is not adhered to, but in all cases an agreement not to bid against particular persons, or not to bid at all, is treated as a fraud. See *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. R. 194; *Wilbur v. How*, 8 Johns. R. 441; *Thompson v. Davies*, 13 Johns. R. 112. See also *Dudley v. Little*, 2 Ham. R. 509; *Piatt v. Oliver*, 1 McClean. 295; *Gulick v. Ward*, 5 Halst. R. 87; *Phippen v. Stickney*, 3 Metcalf, R. 384.

³ *Small v. Jones*, 6 Serg. & Watts, 122.

⁴ *Pingry v. Washburn*, 1 Aik. 264. See *Simpson v. Lord Howden*, 1 Keen, R. 583; s. c. 3 Mylne & Craig, 97; *Lord Howden v. Simpson*, 10 Adolph. & Ell. 793; *The Vauxhall Bridge Co. v. Earl Spencer*, 2 Madd. R. 356; s. c.

§ 549. In the consideration of contracts against public policy, we shall somewhat arbitrarily divide the subject into the following heads: 1st. Contracts in Restraint of Trade; 2d. Contracts in Restraint of Marriage; 3d. Marriage Brokage Contracts; 4th. Wagers and Gaming; 5th. Contracts to offend against the Law and Public Duty; 6th. Usury; 7th. Trading with an Enemy.

CONTRACTS IN RESTRAINT OF TRADE.

§ 550. An agreement in *general* or *total* restraint of trade is void, although it be founded on a legal and valuable consideration. And this doctrine was held at as early a period as during the second term of the reign of Henry V., in the Year-Book of which year (1415) a case is reported where a weaver, in a moment of passion against his trade, gave a bond never to carry it on more, and suit was brought thereupon. Whereupon Mr. Justice Hall, in a violent burst of indignation, exclaimed, “A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, et *per Dieu*, si le plaintiff fuit icy, il irra al prison tanq; il est fait fine au Roy.” In commenting on which language, Lord Macclesfield, in a much later case, says,¹ “I cannot but approve of the indignation that judge expressed, though not his manner of expressing it.” The same rule has been uniformly adhered to even to the present day, and the attempt which was at one time made to restrict it by raising a distinction between parol and sealed contracts, never obtained. An agreement, therefore, not to carry on a certain business anywhere, is invalid, whether it be by parol or specialty, or whether it be for a limited or for an unlimited time.² The reason of this

Jacob. R. 64; Edwards v. Grand Junction Railway Co. 1 Mylne & Craig, R. 650; Hall v. Dyson, 10 Eng. Law & Eq. R. 424.

¹ Mitchel v. Reynolds, 1 P. Wms. 190.

² Mitchel v. Reynolds, 1 P. Wms. 181, where the subject is elaborately dis-

rule is said to be, that the tendency of such agreements would be to promote monopolies, to check competition, enterprise, and industry, and to deprive the public of beneficial services and labors.¹ Thus, where A. gave a bond, by which he bound himself never afterwards "in his own name, or in the name of another, to conduct, carry on, use, or employ, the art, trade, or occupation of an iron-founder or caster, or be concerned, interested, employed, or engaged, directly or indirectly, in any

cussed. *Homer v. Ashford*, 3 Bing. R. 323; *Pierce v. Fuller*, 8 Mass. 223; *Nobles v. Bates*, 7 Cowen, 307; *Morris v. Colman*, 18 Ves. 437; 1 Pow. on Cont. 167; *Hitchcock v. Coker*, 6 Adolph. & Ell. 438; 2 Comyn, on Cont. 467, (1st ed.); *Gale v. Reed*, 8 East, 80; Comyn, Dig. Trade; *Archer v. Marsh*, 6 Adolph. & Ell. 967; *Hinde v. Gray*, 1 Man. & Grang. 195; *Alger v. Thatcher*, 19 Pick. R. 51.

¹ Judge Hall, in *Mitchel v. Reynolds*, 1 P. Wms. 190, states the reasons for this rule to be, "1st. The mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2d, to the public, by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves. 3dly. Because in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action. See Puff. lib. 5, c. 2, sect. 3; 21 H. 7, 20. 4thly. The fourth reason is in favor of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case, it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer. 5thly. The law is not unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void."

manner whatsoever, or under any pretence whatsoever, in the business of founding or casting in iron," it was held, that as it purported to exclude A. everywhere, and at all times, from a participation in the trade or business referred to, it was void, as being against public policy.¹ So, also, a covenant by the lessor of a brewery that he will not, during the continuance of the demise, carry on the business of a brewer or merchant, or agent for the sale of ale, &c., in S. and elsewhere, or in any other manner whatsoever be concerned in the said business," is void, as being a general restraint of trade.² The purchase of an exclusive right to the use of a patent or secret is not, however, within the rule.³

§ 551. But an agreement in *partial* restraint of trade, restricting it within certain reasonable limits or times,⁴ or confining it to particular persons, would, if founded upon a good and valuable consideration, be valid.⁵ And this modification of the rule obtained as early as during the eighteenth year of the reign of James I. (1621).⁶ Such an agreement not only does not obstruct trade, but is oftentimes requisite and necessary, as well for the advantage of the public as of the individual.⁷ Yet such a contract, though it be under seal, requires

¹ *Alger v. Thatcher*, 19 Pick. R. 53.

² *Hinde v. Gray*, 1 Mann. & Grang. 195; s. c. 1 Scott, N. R. 123.

³ *Vickery v. Welch*, 19 Pick. R. 523.

⁴ See *Hastings v. Whitley*, 2 Exch. R. 611; *Sainter v. Ferguson*, 7 Com. B. Rep. 716; *Nicholls v. Stretton*, 10 Q. B. Rep. 346; *Bowser v. Bliss*, 7 Blackf. 344.

⁵ *Rannie v. Irvine*, 7 Mann. & Grang. 976; *Chappel v. Brockway*, 21 Wend. R. 157; *Hartley v. Cummings*, 5 Man. Grang. & Scott, 247.

⁶ *Broad v. Jollyse*, Cro. Jac. 596.

⁷ *Bunn v. Guy*, 4 East, 190; *Mitchel v. Reynolds*, 1 P. W. 181; *Pierce v. Woodward*, 6 Pick. 206; *Perkins v. Lyman*, 9 Mass. 522; *Hayward v. Young*, 2 Chitty, R. 407; *Hitchcock v. Coker*, 1 Nev. & Per. 796; s. c. 6 Adolph. & Ell. 438; *Homer v. Ashford*, 3 Bing. R. 322; *Shackle v. Baker*, 14 Ves. 468; *Palmer v. Stebbins*, 3 Pick. 188; *Davis v. Mason*, 5 T. R. 118. See also *Mallan v. May*, 11 Mees. & Welsb. 653; *Wickens v. Evans*, 3 Younge & Jerv. 318.

a sufficient consideration, which must be either apparent on the face of the deed, or exist in fact, or, if contested, be established by proof.¹ This is, perhaps, the only exception to the general rule, that a specialty imports a consideration, which cannot be denied by either party, although its failure or illegality may be shown *aliunde*. But in cases of this kind, the consideration may be disproved; although otherwise, if apparent upon the deed, it will be presumed to be sufficient.² But if a sufficient consideration be admitted in the pleadings, the deed in restraint of trade will be sustained, although it do not, in its terms, express the exact consideration. Thus, where the plaintiff declared, that the defendant, for the consideration mentioned in the deed declared upon, (which the plaintiff brought into court,) covenanted to submit to certain restrictions of trade, which covenant he broke, it was held, on general demurrer, that the consideration was sufficiently stated.³ It is not necessary, however, that the consideration should be adequate, in point of fact; for a consideration, which would be legally sufficient to support a simple contract, will be ordinarily sufficient to support an agreement for a particular and partial restraint of trade.⁴ Thus, one dollar was held to be a

¹ *Mitchell v. Reynolds*, 1 P. Wms. 181; *Hutton v. Parker*, 7 Dowl. R. 439.

² *Homer v. Ashford*, 3 Bing. R. 322.

³ *Ibid.*

⁴ See *Tallis v. Tallis*, 18 Eng. Law & Eq. R. 162, where Lord Campbell said: "The law relating to contracts in restraint of trade has been altered by late decisions. For many years the contract was void unless the consideration was adequate to the restriction. According to *Parker, C. J.*, in *Mitchell v. Reynolds*, 1 P. Wms. 181, the court was to see that it was made upon a good and adequate consideration so as to be a proper and useful contract. But in *Hitchcock v. Coker*, 6 A. & E. 438, it was held that the court had no judicial perception of the ratio of the consideration to the restriction; and that, if there was a legal consideration of value, the contract ought to be enforced without reference to the quantum of that value. Also in *Mitchell v. Reynolds*, 1 P. Wms. 192, it is said: 'wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *primâ facie* to be bad.' But according to the tenor of the later decisions, the contract is valid unless some restriction is imposed beyond what the interest of the plain-

sufficient consideration for a contract not to run a stage-coach in opposition to the plaintiff.¹ And ten shillings was held to be a sufficient consideration for an agreement not to keep a

tiff requires ; and his interest has been considered to extend very widely. In respect of time, the restriction may be unlimited, according to *Hitchcock v. Coker*, 6 A. & E. 438 ; and, though, in respect of space, there must be some limit, yet contracts have been supported where the area of exclusion was apparently greater than the area of the plaintiff's practice. In *Horner v. Graves*, 7 Bing. 744, where the area of exclusion from practice as a dentist was a circle round York of the diameter of two hundred miles, in giving judgment that this was an unnecessary restriction, it is laid down : ' unless the case was such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering.' And in *Mallan v. May*, 11 M. & W. 667, where exclusion from the practice of a dentist in London, although containing above a million of inhabitants, was held to be reasonable and valid, the court says : ' It would be better to lay down such a limit as, under any circumstances, would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid.' Applying these principles to the present case, and considering that the plaintiff's business, to which the covenant relates, is the diffusion of books published by him in the manner alleged, and thus is almost unconnected with any particular locality, we cannot find that the exclusion of the defendant from London, and from one hundred and fifty miles round the general post-office, and from Liverpool and Manchester, was unreasonable ; and we are therefore of opinion that the plaintiff had a good cause of action in the breaches of contract which he has assigned." See also *Lawrence v. Kidder*, 10 Barb. 649. In this case *Selden, J.*, said, " But while contracts which thus go to the restraint of trade throughout an entire State or country, are uniformly void, those which impose restraint upon it only in a particular town or district, are sometimes held valid. The principal difficulty attending the whole subject is, to ascertain the precise nature of this exception to the general rule, and the reasons upon which it is founded. In many of the early cases the language of the courts would seem to imply that the adequacy or extent of the consideration had something to do with the validity of the contract. They say that a mere pecuniary consideration is not sufficient ; that there must be something, although it does not appear very clearly what, added to this to support the contract. This idea, however, of the necessity of any greater or other consideration for a contract of this description, than any other, was obviously unfounded, and has been exploded by the recent cases. (*Hitchcock v. Coker*, 6 Adolph. & Ell. 438 ; *Green v. Price*, 13 Mees. & Wels. 698)."

¹ *Pierce v. Fuller*, 8 Mass. 223.

draper's shop in Newgate market.¹ If there be no consideration, however, or if the consideration be of no real value, and merely colorable, the contract in restraint of trade, which, in itself, the law never favors, must be either a fraud upon the parties restrained, or a mere *nude pact*; and in either case, it would be void.²

§ 552. The limitations of such a contract must be reasonable in regard both to time and to place. The test of the reasonableness of any restriction is, whether it is such as only affords a fair protection to the party in whose favor it is made, and at the same time does not militate with the public interest. If it be greater than is necessary to insure the protection of the party, it is oppressive, and therefore unreasonable.³ Thus, a contract entered into by a practising attorney, for a valuable consideration, that he would relinquish and make over to B. & G., two other attorneys, his business of attorney, so far as respected his professional practice in London, and one hundred and fifty miles from thence, and that he would not practise as an attorney within those limits, was holden to be valid, although there was no limitation of time.⁴ So, also, an agreement not to run a stage-coach between Providence and Boston, in opposition to the plaintiff's stage-coach,⁵ and an agreement not to be interested in any voyage to the north-west coast of America, or in any traffic with the natives of that coast, for seven years, were both held to be valid.⁶ But an agreement prohibiting to a person the pursuit

¹ *Bragg v. Tanner*, cited *Cro. Jac.* 597. See also *Stearns v. Barrett*, 1 *Pick.* 443; *Palmer v. Stebbins*, 3 *Pick.* 188.

² *Hitchcock v. Coker*, 6 *Ad. & Ell.* 438.

³ *Horner v. Graves*, 7 *Bing.* 735; *Ward v. Byrne*, 5 *Mees. & Welsb.* 548; *Green v. Price*, 13 *Mees. & Welsb.* 695; 16 *Id.* 346; *Rannie v. Irvine*, 8 *Scott, R.* 674; *Mallam v. May*, 11 *Mees. & Welsb.* 653; *Hitchcock v. Coker*, 6 *Adol. & Ell.* 438.

⁴ *Bunn v. Guy*, 4 *East*, 190, cited and recognized by *Tindall, Ch. J.*, in *Hitchcock v. Coker*, 6 *Adolph. & Ell.* 455; *s. c.* 1 *Nev. & Per.* 796.

⁵ *Pierce v. Fuller*, 8 *Mass.* 223; *Hearn v. Griffin*, 2 *Chitty's R.* 407.

⁶ *Perkins v. Lyman*, 9 *Mass.* 532.

of a certain trade throughout the State of New York, has been held to be a contract in total restraint of trade, within meaning of the rule of the common law.¹

§ 553. There is a distinction to be observed between restrictions as to *place*, and restrictions as to *time*. A general restriction as to *place* will vitiate a contract;² but a general restriction as to *time* will not of itself constitute a sufficient

¹ *Lawrence v. Kidder*, 10 Barb. S. C. R. 653. In this case Selden, J., said: "The next question is, whether in passing upon contracts of this description, we are to confine our views to our own State, or whether we are to look at the whole United States as constituting a single State or nation. In other words, whether the same rules are to be applied to a contract embracing the State of New York alone, as by the common law has always been applied to those embracing the whole territory of Great Britain.

"This question involves a variety of considerations, and admits perhaps of considerable discussion. But there are one or two leading ideas, which, in my view, are decisive of it. In the first place, the people of this State have no control over, or influence upon, the municipal laws of the other States. They may, if they please, impose the most burdensome restrictions upon particular trades. We cannot say, therefore, that a restraint which is coextensive with this State leaves the residue of the union open to the party to pursue unrestrained the same trade. Again, it is repugnant to the general frame and policy of our government to regard the union, in respect to our ordinary internal and domestic interests, as one consolidated nation. For all these purposes each State is a separate community with separate and independent public interests. It is by no means the same thing to the people of this State, whether an individual carries on his trade within or without its borders. I am, therefore, of the opinion, independent of authority, that a contract prohibiting to an individual the pursuit of any trade or employment throughout the State of New York, should be regarded as a contract in total restraint of trade within the rule of the common law.

"This seems to have been the view taken by the supreme court in the case of *Chappel v. Brockway*, (21 Wend. 157,) before referred to; although it does not appear that the point was then raised, nor did the case necessarily involve it. Judge Bronson says, that 'contracts which go to the total restraint of trade, as that a man will not pursue his occupation or carry on business anywhere in the State, are void.'"

² *Ward v. Byrne*, 5 Mees. & Welsb. 548; *Lawrence v. Kidder*, 10 Barb. S. C. R. 653; *Hitchcock v. Coker*, 6 Adolph. & Ell. 438; *Tallis v. Tallis*, 18 Eng. Law & Eq. R. 162.

ground to avoid it. If, therefore, the contract restrict the defendant from carrying on a trade within a space far greater than is necessary to protect the plaintiff in the enjoyment of his trade, the restriction would be considered as unreasonable, and could not be enforced. The reasonableness of the distance, prescribed by the terms of the agreement, will vary, of course, with the peculiar circumstances of each case, and must depend upon the populousness of the neighborhood, the nature of the trade or profession, and the mode in which it is carried on.¹ But the fact that the agreement in restraint of trade is indefinite, in respect to its duration, will not avoid it, if, in other respects, it be reasonable. Thus, where the condition of a bond was, that the obligor, after leaving

¹ See the remarks of Parke, B., in *Ward v. Byrne*, 5 Mees. & Welsb. 548; *Hinde v. Gray*, 1 Scott's N. R. 123; *Hitchcock v. Coker*, 6 Adolph. & Ell. 455. See 1 Nev. & Per. 796; *Horner v. Graves*, 7 Bing. 735; *Archer v. Marsh*, 6 Adolph. & Ell. 967; s. c. 2 Nev. & Per. 562. In *Proctor v. Sargent*, 2 Mann. & Grang. 33, Tindal, Ch. J., said: "I think the rule is properly laid down in *Hitchcock v. Coker*, where it is said that 'where the restraint of a party from carrying on a trade is larger and wider than the protection of the person with whom the contract is made, can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void.' Although a contract restraining a party from carrying on the business of a dentist within one hundred miles round York was decided to be unreasonable in *Horner v. Graves*, it does not follow that we are to hold in this case that a radius of five miles is also unreasonable. This must depend upon the population, the nature of the business, and how far it is ramified in that radius, and upon other circumstances of which we are not bound to take notice. Also, I think that when we are deciding upon the unreasonableness of a contract of this kind, we cannot leave out of consideration the duration of the restraint; for, although I admit that where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good, yet where the question is, whether the restraint is unreasonable or not, in point of space, that which would be unreasonable were it to continue for any length of time, may not be so when it is to last only for a day or two. I approve of the ruling in *Ward v. Byrne*, but I deny its application to the present case. I think that we cannot hold that the contract set out in this declaration is void, and that our judgment must be for the plaintiff."

the service of the obligee, should not set up business in a shop within half a mile of the obligee, during her life, the restriction, although indefinite in point of time, was held to be good.¹ So, also, where a surgeon took an assistant, who entered into a bond not to practise on his own account, for fourteen years, within ten miles of the place where the surgeon lived, the bond was held to be good.² And where a special distance is stated it is to be estimated by the shortest mode of access; if such a construction would subserve the purposes of the contract.³

§ 554. The question whether a restriction of trade is or is not reasonable, is one of law for the court, and not of fact for the jury; and the tendency in the courts has been to construe all restrictions liberally, and not strictly.⁴ But whenever a

¹ *Hitchcock v. Coker* in error, 6 Adolph. & Ell. 453; *Woods v. Dennett*, 2 Stark. R. 89; *Leighton v. Wales*, 3 Mees. & Welsb. 550; *Archer v. Marsh*, 6 Adol. & Ell. 966; s. c. 2 Nev. & Per. 562. See, also, *Pemberton v. Vaughan*, 10 Adolph. & Ell. (N. S.) 87; *Price v. Green*, 16 Mees. & Welsb. 346.

² *Davis v. Mason*, 5 T. R. 118. See, also, *Wallis v. Day*, 2 Mees. & Welsb. 273.

³ *Woods v. Dennett*, 2 Stark. 89, by Lord Ellenborough; *Leigh v. Hind*, 9 Barn. & Cres. 774, per Tenterden and Littledale. Parke thought the distance should be estimated by an air-line, or "as the crow flies."

⁴ *Mallan v. May*, 11 Mees. & Welsb. 653; *Proctor v. Sargent*, 2 Man. & Grang. 31. But see *Lawrence v. Kidder*, 10 Barb. S. C. R. 650. In this case the doctrines relating to restraint of trade are ably and elaborately considered, and Mr. J. Selden, in delivering the judgment of the court says, "It is said in many of the cases that the contract must be reasonable; that it must not impose restrictions upon one party which are not beneficial to the other. In the leading case on the subject, referred to in all the later cases, Ch. J. Parker says, that in order to uphold a contract of this kind, it must appear 'that it was reasonable for the parties to enter into it; that it was a proper and useful contract, and such as could not be set aside without injury to a fair contractor.' *Mitchell v. Reynolds*, 1 P. Wms. 181. And in the late case of *Chappel v. Brockway*, before cited, Judge Bronson says that, 'whatever may be the pecuniary consideration, it must appear in addition that there was *some good reason* for entering into the contract, and that it imposes no restraint upon

contract is made in restraint of trade, the burden of showing that it is valid and reasonable and founded on a good consideration, rests on the party seeking to enforce it.¹

§ 555. There is another class of contracts of an analogous character, whereby a person is restricted from dealing with others than individuals specified in the contracts, which are not considered as against public policy, nor in restraint of trade.² Thus, a demise of a house, with an agreement on the

one party which is not beneficial to the other.' All this, however, about the reasonableness of the contract, its benefits to the one or the other party, the inadequacy of a pecuniary consideration, &c., is obviously founded upon the erroneous idea that in regard to this species of contract, the law, not content with effectually protecting the rights of the public, undertakes to extend its guardianship over the private interests of the parties concerned — to supervise their acts with a view to their own individual advantage. This notion cannot be reconciled with that uniform policy which leaves parties to make whatever contracts they please, provided no legal or moral obligation is thereby violated or any public interest impaired, nor with some of the adjudications on this particular subject. Judge Bronson himself, in *Chappel v. Brockway*, while he adopts the phraseology of some of the old cases, notices the fact that the cases of *Pierce v. Fuller*, (8 Mass. Rep. 223,) and *Palmer v. Stebbings*, (3 Pick. 188,) can not be reconciled with the idea implied by that phraseology, and yet he says, that it does not appear that the court (in those cases) intended to lay down a new rule. . . . The whole doctrine on the subject may be summed up in this: that the law will tolerate no contract which upon its face goes to prevent an individual for any time, however short, from rendering his services to the public in any employment to which he may choose to devote himself; nor one which deprives any section of the country, however small, of the chances that the obligor in such contract may furnish to it the accommodation arising from the prosecution of a particular trade, unless it appear that the obligee himself intends to and can supply such accommodation.

"I am not here establishing any new rule. It is the doctrine to be deduced from all the cases, taken together, and it harmonizes with them all. Thus construed, there is no conflict among the authorities, so far as the points adjudicated are concerned, although many dicta may, no doubt, be found, which are more or less inconsistent with the view here taken."

¹ *Ross v. Sadgbeer*, 21 Wend. R. 166.

² *Cooper v. Twibill*, 3 Camp. 285, note; *Rannie v. Irvine*, 7 Man. & Gran. 969 ;

part of the lessee to buy all his beer of the lessor is good.¹ So, also, a condition in a deed of composition, that a publican shall continue to deal with his creditors for twelve years in the articles of their respective trades, is valid. So, also, a contract with the proprietors of a theatre not to write dramatical pieces for any other theatre, is legal.² But in all such cases, the person restricted is only bound to deal with the specified persons so long as they furnish good articles of a marketable and wholesome quality; and if the articles supplied prove to be stale, unwholesome, or bad, the restriction is not binding.³ Thus, where a house was leased on condition that the lessee should purchase his beer from the lessor, and the former was sued for breach of condition, and it appeared that he had purchased of other persons than the lessor, but that the beer supplied by the lessor had been bad, nauseous, and unwholesome, it was held that the lessee was not, under such circumstances, bound to conform to the condition.⁴

§ 556. Patented inventions, and secrets of art or trade, not patented, are not within the purview of the rule against restraint of trade; and a trader may sell a secret in his art, and restrain himself generally from the use of it. These exceptions are allowed for the purpose of stimulating inventive genius, and of encouraging science and well-directed ingenuity. An agreement in relation to the disposition and use of patented machines, although it be in restraint of trade, will

Jones v. Edney, 3 Camp. R. 285; *Holcombe v. Hewson*, 2 Camp. R. 391; *Doe d. Calvert v. Reid*, 10 Barn. & Cres. 849; *Gale v. Reed*, 8 East, R. 80; *Morris v. Colman*, 18 Ves. Jr. 437; *Weaver v. Sessions*, 6 Taunt. R. 154.

¹ *Cooper v. Twibill*, 3 Camp. R. 285, n.; *Jones v. Edney*, 3 Camp. R. 285; *Holcombe v. Hewson*, 2 Camp. R. 391.

² *Morris v. Colman*, 18 Ves. 437.

³ *Holcombe v. Hewson*, 2 Camp. R. 391; *Thornton v. Sherratt*, 8 Taunt. R. 529.

⁴ *Cooper v. Twibill*, 3 Camp. R. 285, note.

be binding, if made within the time to which such patent right is limited.¹

CONTRACTS IN RESTRAINT OF MARRIAGE.

§ 557. In the next place, contracts in restraint of marriage are void, upon grounds of public policy. If a man and woman reciprocally agree to marry each other, the contract is undoubtedly good. But if, by the terms of the contract, one of the parties be restrained from marrying at all, or from marrying anybody, unless it be a particular person, and there be no corresponding obligation on that person, the contract is considered as injurious to the general interests of society, and therefore void.² Thus, an agreement between a man and a woman, by which he promised to pay her £1,000, if he married any person except herself, was held to be void.³ So, also, a bond from a widow not to marry again, was decreed to be delivered up, although there was a counter bond to pay her a sum of money, if she did not.⁴

§ 558. So, also, a wagering contract for fifty guineas, that the plaintiff would not marry within six years, is *primâ facie* in restraint of marriage, and is void, unless it appear that such restraint was prudent and proper under the circumstances.⁵

¹ Bryson v. Whitehead, 1 Sim. & Stu. 74; Vickery v. Welch, 19 Pick. 526.

² Baker v. White, 2 Vern. 215; Low v. Peers, Wilmot, 364; s. c. 4 Burr. 2225; Cock v. Richards, 10 Ves. Jr. 429, 438; Key v. Bradshaw, 2 Vern. 102; Atkins v. Farr, 1 Atk. 287; s. c. 2 Eq. Abr. 247, 248; Woodhouse v. Shepley, 2 Atk. 535; 1 Story, Eq. Jurisp. § 274.

³ Low v. Peers, Wilmot, 364; s. c. 4 Burr. 2225; S. P. Cock v. Richards, 10 Ves. Jr. 429, 438.

⁴ Baker v. White, 2 Vern. 215. There is a distinction in the Roman law between general restraints of marriage, and restraint in respect of some particular person; and the former class of cases was held to be contrary to policy, and void; but not the latter. Pothier, Pand. Lib. 35, tit. 1, n. 34; Dig. Lib. 35, tit. 1, c. 63, l. 64; 1 Story, Eq. Jur. § 277.

⁵ Hartley v. Rice, 10 East, R. 22.

§ 559. Conditions annexed to gifts, legacies, and devises, in restraint of marriage generally, are conditions in violation of public policy, and that freedom of choice, which is the safeguard of marriage; and are all void. So, also, if the condition, although it be not in restraint of marriage generally, narrow down and limit the freedom of choice, so as unreasonably to check and restrain it, it will be void. Thus, where a legacy was given to a daughter, on condition that she should not marry without consent, or should not marry a man who was not seized of an estate in fee-simple, of the clear yearly value of £500; it was held to be a void condition, because it tended directly to prohibit marriage.¹

§ 560. Yet if the condition be reasonable in itself, and do not, in point of fact, operate improperly to restrain the contract of marriage, it will be binding; for the law will not break down those conditions, which a provident affection has erected to guard the inexperience of youth against the machinations of the crafty and selfish; and while its policy is to encourage entire freedom of choice in marriage, it will also protect the rash and hasty from the consequences of their own folly. Yet a parent, under the pretence of affection and generosity, cannot incumber his gift with conditions, that obstruct the real interests of the child, or the claims of society.² Thus, a legacy given to a daughter, to be paid her at twenty-one years of age, on condition that she do not marry before that time, is valid; for such a postponement would manifestly enure to the benefit of the child.³ So, also, a condition not to marry against the consent of friends,⁴ or not to marry a particular person; or pre-

¹ *Keily v. Monck*, 3 *Ridgway*, Parl. R. 205, 244, 247, 261; 1 *Eq. Abr. Con-*
dition, C. in marg.; 1 *Chitty*, *Eq. Dig. Marriage*, IV.; 1 *Story*, *Eq. Jurisp.* §
 280.

² 1 *Story*, *Eq. Jurisp.* § 280, 281; 1 *Fonbl. Eq. B.* 1, ch. 4, § 10, note *g*;
Godolphin, *Orphan's Legacy*, Pt. 1, ch. 15, § 1.

³ *Stackpole v. Beaumont*, 3 *Ves.* 96, 97; *Scott v. Tyler*, 2 *Dick. R.* 721, 722,
 724.

⁴ *Desbody v. Boyville*, 2 *P. Wms.* 547; *Scott v. Tyler*, 2 *Bro. Ch. R.* 431,

scribing a particular place, or particular ceremonies,¹ is good; because such conditions are not considered as creating an unreasonable restraint of marriage. The same rule also applies to a condition in the will of a husband, that his widow shall not marry again, or that she shall only receive an annuity while she remains a widow.² But a condition, that a child shall not marry until fifty years of age,³ or shall not marry any person inhabiting the same town, or county, or State, or shall not marry any person, unless he be of a particular profession or trade, is void; because it operates as a virtual restraint of marriage generally.⁴

§ 561. If the condition of a gift or devise be precedent, the party in whose favor it is made must strictly comply with its requisitions. If the condition, however, be subsequent, the necessity of complying with it depends entirely upon its legality. For if it be illegal or void in any way, it is wholly inoperative, and the gift becomes absolute and unfettered by it. But if it be legal, it has the same operation and effect as any other condition, and if it be broken, will destroy the right of the party holding under it.⁵

485; s. c. 2 Dick. R. 722; *Clarke v. Parker*, 19 Ves. 1; *Lloyd v. Branton*, 3 Meriv. 108; *Dashwood v. Bulkeley*, 10 Ves. 239.

¹ *Scott v. Tyler*, 2 Bro. Ch. R. 488; s. c. 2 Dick. 721; *Godolp. Orp. Leg. Pt. 3*, ch. 17, § 1 to § 10; 1 Story, Eq. Jurisp. § 285.

² *Scott v. Tyler*, 2 Bro. Ch. R. 488; s. c. 2 Dick. 721, 722; *Harvey v. Aston*, 1 Atk. 379; *Marples v. Bainbridge*, 1 Madd. R. 590; *Richards v. Baker*, 2 Atk. 321; 1 Roper on Leg. by White, ch. 13, § 2, p. 721, 722.

³ 1 Story, Eq. Jurisp. § 283.

⁴ *Scott v. Tyler*, 2 Bro. Ch. R. 488; s. c. 2 Dick. 721.

⁵ 1 Story, Eq. Jurisp. § 288; Co. Litt. 206, a and c; *Id.* 217 a; *Id.* 237; H. & G.'s note, (152); *Bertie v. Faulkland*, 3 Ch. Cas. 130; s. c. 2 Freem. R. 220; 2 Vern. 333; 1 Eq. Cas. Abr. 110, margin; *Harvey v. Aston*, Com. R. 726; s. c. 1 Atk. 361; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note *g*; *Graydon v. Hicks*, 2 Atk. 16; *Long v. Dennis*, 4 Burr. 2052; *Popham v. Bampffield*, 1 Vern. R. 83. In the civil and ecclesiastical law, there is no distinction between conditions precedent and conditions subsequent in respect to marriage. *Harvey v. Aston*, 1 Atk. R. 375; *Reynish v. Martin*, 3 Atk. R. 332.

§ 562. Again, there is another class of contracts relating to marriage, namely, — where a deed is made between a husband and wife, providing for their future separation, — which are considered void, as being against the policy of the law, and tending to facilitate the separation of husband and wife.¹ Thus, a deed conveying lands as a security for the separate maintenance of the wife, in case future differences between husband and wife should arise, and they should cease to live together, is void.² But a deed contemplating an *immediate* separation is held to be valid, on the ground, that if a separation is decided upon and inevitable, such a deed serves to save the wife from destitution.³ So, also, although a deed should purport to be made in contemplation of an immediate separation, yet if, in fact, the parties should continue to live together, apparently as man and wife, it would not be good.⁴

§ 563. Again, where the separation of man and wife is inevitable and decided upon, a contract to furnish money to defray the expenses of procuring a divorce, would be binding, as not tending to induce a separation, but only to provide means to effect an ultimate decision.⁵

MARRIAGE BROKAGE CONTRACTS.

§ 564. Marriage brokerage contracts, by which are meant contracts or agreements to negotiate a marriage between two

¹ *Durant v. Titley*, 7 Price, R. 577; *Hindley v. The Marquis of Westmeath*, 6 Barn. & Cres. 200, 212.

² *Hindley v. The Marquis of Westmeath*, 6 Barn. & Cres. 201, 212.

³ *Ibid.* *Jee v. Thurlow*, 2 Barn. & Cres. 547; *St. John v. St. John*, 11 Ves. R. 534.

⁴ *Hindley v. The Marquis of Westmeath*, 6 Barn. & Cres. 200, 212.

⁵ *Moore v. Usher*, 7 Sim. R. 384.

parties, for a certain compensation, are utterly void,¹ and incapable of confirmation;² and even money paid upon them may be reclaimed in equity.³ The law considers marriage as a moral and political duty, and all improper restrictions upon freedom of choice, and all agreements tending to impair that mutual love and confidence upon which domestic happiness has its only safe foundation, and which are the only securities for faithfulness and morality in marriage, are stains which it will not permit to rest upon its ermine. Where, therefore, a bond was given, by which the obligor bound himself to pay a certain compensation to the obligee for his assistance afforded in effecting an elopement and marriage, it was held to be utterly void, although it was freely given after the marriage, and not in consequence of any previous agreement to that effect; upon the ground, that it directly tended to encourage an immoral and illegal act, and, to enforce it, would be to offer a reward for seduction.⁴ For the same reason, if a parent or guardian, or any person nearly connected to a party, privately connive with a third person, and agree to forward a marriage between such parties, by the exertion of an improper influence, in consideration of a certain compensation; or agree, upon payment of a certain sum, to consent to such marriage, the contract will be utterly void; upon the ground that it is a bargain in contravention of the right of third persons, and as iniquitous morally as legally. Thus, where a party gave a

¹ *Boynton v. Hubbard*, 7 Mass. 118; *Arundel v. Trivellian*, 1 Rep. Ch. 87, (87); *Drury v. Hooke*, 1 Vern. 412; *Hall v. Potter*, 3 Lev. 411; s. c. *Showers*, Parl. Cas. 76; *Cole v. Gibson*, 1 Ves. 507; *Debenham v. Ox*, 1 Ves. 276; *Smith v. Aykwell*, 3 Atk. 566; *Hylton v. Hylton*, 2 Ves. 548; *Stribblehill v. Brett*, 2 Vern. 446; s. c. *Prec. Ch.* 165; 1 Bro. Parl. Cas. 57; *Roberts v. Roberts*, 3 P. Wms. 74, note 1; *Ib.* 75, 76; *Law v. Law*, 3 P. Wms. 394; 1 Story, Eq. Jurisp. 263; *Drury v. Hooke*, 1 Vern. 412.

² *Cole v. Gibson*, 1 Ves. 503; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note s; *Roberts v. Roberts*, 3 P. Wms. 74, and Cox's note.

³ *Smith v. Bruning*, 2 Vern. 392; 1 Fonbl. Eq. B. 1, ch. 4, § 10; *Goldsmith v. Bruning*, 1 Eq. Abr. 89.

⁴ *Williamson v. Gihon*, 2 Sch. & Lef. 356, 362.

bond for a particular sum to B., in consideration, that B. would consent that he should marry B.'s daughter, it was held to be void.¹

WAGERS AND GAMING.

§ 565. Gaming by itself is lawful by the common law, unless it be accompanied by fraud, and then the fraud invalidates the contract.² Money fairly lost at gaming, and paid, cannot, therefore, be recovered at law by an action for money had and received.³ Statutes have, however, been passed in England, and in this country, by which gaming is prohibited; and whenever it is forbidden by statute, money lost at gaming can be recovered from the party to whom it is paid, provided the case be within the prohibition of the statute.⁴ So, also, it has been held in England, that money knowingly lent for gaming purposes is not recoverable.⁵ Again, in view of the disastrous effects of gaming in the production of idleness and dissipation, and waste of property, and the consequent ruin of families, as well as that it is prohibited by statute, courts of equity not only refuse to interfere to enforce contracts of gaming, but lend their aid to suppress them, and a bill in equity will be supported to have any gaming security delivered up and cancelled.⁶

¹ *Keat v. Allen*, 2 Vern. R. 588; 1 Madd. Ch. Pr. 231; 1 Fonbl. Eq. B. 1, ch. 4, § 11; 1 Eq. Cas. Abr. 90, F. 5.

² *Sherbon v. Colebach*, 2 Vent. R. 175; *Thistlewood v. Cracroft*, 1 Maule & Selw. 500; *Bulling v. Frost*, 1 Esp. R. 235; *Bosanquet v. Dashwood*, Cas. Temp. Talb. 41; *Rawden v. Shadwell*, Amb. R. 269; *Wilkinson v. L'Eaugier*, 2 Younge & Coll. 364; *Babcock v. Thompson*, 3 Pick. R. 446.

³ *Cotton v. Thurland*, 5 T. R. 405.

⁴ *Ibid.* *Thorpe v. Coleman*, 1 Man. & Grang. (N. S.) 990.

⁵ *McKinnell v. Robinson*, 3 Mees. & Welsb. 434. But see *contra* *Utica Ins. Co. v. Scott*, 19 Johns. R. 1; *Utica Ins. Co. v. Bloodgood*, 4 Wend. R. 652; *Utica Ins. Co. v. Cadwell*, 3 Wend. R. 296.

⁶ *Story*, Eq. Jurisp. § 303, 304; 1 Fonbl. Eq. B. 1, ch. 4, § 6, and note *e*; *Robinson v. Bland*, 2 Burr. 1077; *Rawden v. Shadwell*, Amb. R. 269, and Mr.

§ 566. The statute provisions do not generally extend, however, so far as to embrace within them wagers, which are a species of gaming. But the law, although it tolerates wagers, holds them in no favor; and wherever any particular wager is either contrary to public policy, or, in any manner, immoral and injurious, or even troublesome and impertinent, it cannot be enforced. The courts have often reprehended these contracts, and seize upon every opportunity and every circumstance to invalidate them. But it is well established at common law, that a wager is a legal contract, which the courts are bound to enforce, although it be in respect to a matter which is trifling, or in which the parties have no interest.¹ The famous case, in which this bold doctrine was first clearly laid down, arose upon a wager, whether or not a certain person had bought a wagon before a certain day: and it was held to be legal, and the winner was allowed to recover against the loser the amount of the wager. Mr. Justice Buller, nevertheless, dissented from the opinion of the other three judges, and insisted that the court ought to refuse to waste its time in the consideration of such questions.² The doctrine is now well

Blunt's notes; *Woodroffe v. Farnham*, 2 Vern. R. 291; *Wynne v. Callander*, 1 Russ. R. 293; *Portarlington v. Soulby*, 3 Mylne & Keen, 104.

¹ *Jones v. Randall*, Cowp. 37; *Edgell v. McLaughlin*, 6 Whart. 176; *Good v. Elliott*, 3 T. R. 693; *Morgan v. Pebrer*, 4 Scott, 230; s. c. 3 Bing. N. C. 460; *Bunn v. Riker*, 4 Johns. R. 426; *Bland v. Collett*, 4 Camp. 457. A wager on a subject, in which the parties have no interest, is not valid in New Hampshire. *Perkins v. Eaton*, 3 N. Hamp. 152. See *Stetson v. Mass. M. F. Ins. Co.* 4 Mass. R. 330; *Lewis v. Littlefield*, 15 Maine R. 233; *Rice v. Gist*, 1 Strob. R. 82; *Collamer v. Day*, 2 Verm. R. 144; *West v. Holmes*, 26 Verm. R. 530.

² *Good v. Elliott*, 3 T. R. 698. In this case, Buller, J., said: "I take it to be agreed by all my brethren, with whom I have the misfortune to differ, that if the wager concern the interest of the public, or impute a crime or disgrace to another person, it is void, and cannot be made the subject of an action. The question then is, whether there be any found difference between a wager throwing an imputation on another, and a wager which respects his property only; I can find none. But, on the contrary, I go further; for I hold, that though the wager imputes no crime or disgrace to another, and though it do

settled, that wagers upon indifferent matters, without other interest to either party than results from the wager, are legal, un-

not call in question any pecuniary interest of another ; yet, *if it concern the person of another, no action can be maintained upon it.* And, therefore, I am of opinion that a bet on a lady's age, or whether she has a mole on her face, is void. No third person has a right to make it a subject of discussion in a court of justice, whether she passes herself in the world as being more in the bloom of youth than she really is, or whether what is apparent in her face to every one who sees her is a mole or a wart ; and yet these are circumstances which cannot, in a court of law, be stated as an injury ; for if a man say that a young woman who passes for twenty-three years of age is thirty-three, or that she has a wart on her face, (which is considered as a nasty thing,) no action will lie for it. I will put one case more, which, if it do not appear too ludicrous, perhaps may be found to bear upon the present question. Suppose a bet were made whether a young lady squinted with her right eye or her left eye ; shall it be the subject of sober inquiry in a court of justice how the organs of her eyes are formed, and which of them it is that looks directly to the object before her ? Shall the parties in the action be permitted to say, the inquiry is no injury to her, for everybody sees that she squints, and it makes no difference to her whether it be with one eye or the other ? No. The answer is, you the plaintiff and defendant have no right by an idle wanton bet to bring her person or even her name in question. The principle of the cases, in which it has been said that a bet respecting a third person is void, is not because it occasions a temporal loss to that third person, or because it subjects him to punishment, but because the laws of the country are calculated only to try adverse rights, and not to indulge or entertain the impertinent inquiries of others, upon matters in which they are in nowise interested. What is it to the plaintiff or the defendant, whether this woman bought the wagon, or stole it, or whether she has paid for it, or is insolvent and never can pay for it ? If it be permitted to these parties to try whether this woman owes £4 for the wagon to the former owner of it, the necessary consequence is, that any two men may try all the debts, the circumstances, and the solvency of another, which will afford a ready mean of making men in trade bankrupts before their time. If it appear on the face of the record that the interest of the public, or of an individual, is materially affected, the proper way of taking advantage of the objection is by demurrer, or by motion in arrest of judgment. *Da Costa v. Jones*, and *Atherford v. Beard*, are express authorities upon this point ; and by them it is established that if the action lead to *improper inquiries* it may be stopped *in limine*. The case of *Atherford v. Beard* can be supported on no other grounds ; for in that case there was a confession by the defendant that he had lost the wager, and, therefore, it was unnecessary, and indeed it was

less they are in respect to a subject, which is libellous, indecent, illegal, and violates public policy, good morals, or the peace of society.¹

not attempted, to unravel or examine any accounts respecting the public revenue. But where the inquiry affects the character or interest of an individual, justice can only be done by stopping it at the outset; for if the parties are permitted by their counsel to tell their own story at large in public, it is a very feeble and inadequate mode of protecting the character of the person traduced, for the court to say we cannot receive evidence of what has been stated, or, after the mischief has been done, to say it should not have been done. By the very statement of the case the busy curiosity and the foolish tattle of the world are set in motion; and it is beyond the reach of human jurisprudence afterwards to efface its effects. Let us adhere then to the case of *Da Costa v. Jones*, and much mischief will be prevented, no inconvenience can arise. The wisdom of that determination convinced the mind of every man who heard or who has read it; and I can find no reason for departing from it in one instance more than in another, in which it is said that the action cannot be maintained. One case in which it is determined that the action will not lie is where the bet affects the *interest* or the *feelings* of a third person. I subscribe to both the propositions. The interest or the feelings of a third person may both be involved in this inquiry; but if it affect her *interest* only, that decides against the plaintiff. And when we speak of the *feelings* of others, I know of no line to go by, but whether the matter at all concerns the *person* or *transactions* of another. Men's feelings are as different as their faces; one man will exult in having made a sharpening bargain, when another would blush at the mention of it; but the craft of the one, or the remorse of the other, are not apt to be put to the test by an action on an idle wager between other persons." However difficult it may seem to answer the reasoning of Mr. Justice Buller, the decision in *Good v. Elliott* has been adhered to ever since, and is now well established. See cases cited *supra*, and also *Hussey v. Crickitt*, 3 Camp. R. 168; *Jones v. Randall*, Cowp. R. 37; *Fisher v. Waltham*, 4 Q. B. R. 889; *Moon v. Durden*, 2 Excheq. R. 22; *Thackoorseydass v. Dhondmull*, 6 Moore, P. C. 300; *Doolubdass v. Ramloll*, 3 Eng. Law & Eq. R. 39; *Grant v. Hamilton*, 3 McLean, R. 100; *Ross v. Green*, 4 Harington, R. 308; *Dunman v. Strother*, 1 Texas R. 89. In the later case of *Evans v. Jones*, 5 Mees. & Welsb. 82, one of the learned judges said, "It is too late now to say that no wager can be enforced at law, though I think it would have been better if they had been originally left to the decision of the jockey club."

¹ In the Rev. Statutes of New York, 1 R. S. 663, § 8, it is declared, that "all wagers, bets, or stakes, made to depend on any race or upon any gaming

§ 567. A wager, however, on a subject which is illegal,¹ or which offends against public policy, is void. Thus, a wager as to the event of a sparring match;² or a cockfight;³ or whether a horse can trot eighteen miles within an hour;⁴ are illegal; because they tend to create disturbance, and to encourage cruelty. So, also, a wager, as to whether a war will be declared;⁵ or whether a prisoner will be convicted on a criminal charge;⁶ or upon the event of an election;⁷ or that a plaintiff will not marry within six years; is void.⁸

§ 568. So, also, wagers, which tend to affect the feelings or interests of third persons;⁹ or lead to indecent exposures and

by bet or chance, or upon any bet, chance, casualty, or unknown or contingent event whatsoever, shall be unlawful;" and "all contracts for and on account of any money or property or thing in action so waged, bet, or staked, shall be void." See also *Peck v. Briggs*, 3 Denio, R. 108, and *Lewis v. Miner*, 3 Denio, R. 103. Gaming is also prohibited in Massachusetts, and money lost in gaming can be recovered; Rev. Stat. p. 1, ch. 50, § 12, § 14, § 15. It is declared that persons losing money by gaming may recover it back, and if within three months he do not sue therefor, any other person may sue therefor, and recover treble the value of the money or goods lost, one moiety being to the use of the commonwealth, and the other to the suitor. All securities and conveyances are also declared void if any part of the consideration therefor be for gaming; except as to *bonâ fide* holders for a valuable consideration without notice. / Mass. Rev. Stat. ch. 50, § 13-16, p. 387.

¹ *Denniston v. Cook*, 12 Johns. 376.

² *Hunt v. Bell*, 1 Bing. 1; s. c. 7 Moore, 212; *Egerton v. Furzeman*, 1 Carr. & Payne, 613.

³ *Squires v. Whisken*, 3 Camp. 140.

⁴ *Brogden v. Marriott*, 3 Bing. N. C. 88; s. c. 2 Scott, 712.

⁵ *Allen v. Hearn*, 1 T. R. 57, n. b; *Busk v. Walsh*, 4 Taunt. 290.

⁶ *Evans v. Jones*, 5 Mees. & Welsb. 77.

⁷ *M'Allister v. Hoffman*, 16 Serg. & Rawle, 147; *Hickerson v. Benson*, 8 Miss. R. 8; *Ball v. Gilbert*, 12 Metcalf, R. 397; *Tarleton v. Baker*, 18 Verm. 9; *Wheeler v. Spencer*, 15 Conn. 28; *Stoddard v. Martin*, 1 Rhode Island, 1; *Gardner v. Nolen*, 3 Harrington, 420.

⁸ *Hartley v. Rice*, 10 East, 22; *Rust v. Gott*, 9 Cowen, 169; *Wroth v. Johnson*, 4 Harr. & McHen. 284; *Allen v. Hearn*, 1 T. R. 51.

⁹ It has been decided in the Supreme Court of Pennsylvania, that no wager

examinations; or are in any manner *contra bonos mores*; ¹ are void. Thus, a wager, as to the sex of the celebrated Chevalier D'Eon; ² and a wager, as to whether Joanna Southcote, a pretended prophetess, and an unmarried woman, would have a child by a certain day, was held to be illegal.³ So, also, a wager whether a woman has committed adultery; or has had a bastard child; or any wager, which wantonly exposes a person to ridicule or improper imputation, or which operates as a libel, is void.⁴

CONTRACTS TO OFFEND AGAINST THE OBLIGATIONS OF COMMON
LAW AND PUBLIC DUTY.

§ 569. Contracts to do acts which are indictable, or punishable criminally; or to conceal and compound such acts; or to suppress evidence in a criminal prosecution, are void.⁵ Thus, it is a good defence to an action, for not supplying manuscript to complete a work, according to agreement, that the matter of the intended publication is of an unlawful and indictable nature.⁶ So, also, a contract to indemnify a printer for publishing a libel;⁷ or to save harmless any person intending to commit an assault, is void. So, also, a bond, note, or other promise, is void, if it be given in consideration of compounding a prosecution for felony,⁸ treason, or a public misdemeanor;⁹

concerning any human being is recoverable, in a court of justice. *Phillips v. Ives*, 1 Rawle, 37. The court was, however, divided in opinion.

¹ *Eltham v. Kingman*, 1 Barn. & Ald. 684.

² *Da Costa v. Jones*, Cowp. 729.

³ *Ditchburn v. Goldsmith*, 4 Camp. 152.

⁴ *Da Costa v. Jones*, Cowp. R. 729; *Atherfold v. Beard*, 2 T. R. 610; *Gilbert v. Sykes*, 16 East, R. 150; *Hartley v. Rice*, 10 East, R. 22; *Shirley v. Sankey*, 2 Bos. & Pul. 130.

⁵ *Badger v. Williams*, 1 Chip. R. 137.

⁶ *Gale v. Leckie*, 2 Stark. R. 107.

⁷ *Poplett v. Stockdale*, per Best, C. J. 2 Carr. & Payne, R. 198; s. c. 1 Ryan & Mood. R. 337.

⁸ *Fivaz v. Nicholls*, 2 Man. Gr. & Scott (C. B.), 501.

⁹ *Prole v. Wiggins*, 3 Scott, 607; s. c. 3 Bing. N. C. 230; *Collins v. Blantern*,

or in consideration of concealing treason and felony,¹ it being a punishable misprision; or of compounding informations on penal statutes, in criminal cases,² or of compromising an assault with riot and obstruction of a public officer.³ So, also, an agreement to pay a sum of money to an officer, for an escape from mere arrest, or from prison; and an agreement, by a third person, to indemnify an officer, for neglecting his duty in the service of a precept, being founded on a consideration to do an illegal act, are void.⁴ But if the agreement be by a creditor, and the object be only to try a contested title, it would probably be good.⁵ The same general rule applies, where an officer takes a bond or note of a prisoner, confined for a criminal offence, in consideration of his going at large, and as a security for his return into custody; because the indulgence is a violation of his duty on the part of the officer, for which he is indictable.⁶ So, also, a contract to reprint a literary work, in violation of a copyright, secured to a third person, is void.⁷ So, also, a contract to indemnify a person for a future act known to be a trespass, is void; although, if the act be not known to be a trespass, the contract would be

2 Wils. 347; *Queen v. Barmston*, 3 Nev. and P. 167; *Edgcombe v. Rodd*, 5 East, 294; *Commonwealth v. Pease*, 16 Mass. 91; *Ayer v. Hutchins*, 4 Mass. 373; *Commonwealth v. Cony*, 2 Mass. 523; *Hinesburgh v. Sumner*, 9 Vermont, 23; *Den v. Moore*, 2 Southard, 470; *People v. Buckland*, 13 Wendall, 592; *Bell v. Wood*, 1 Bay, 249; *Cameron v. McFarland*, 2 Car. Law Repos. 415; *Harding v. Cooper*, 1 Stark. R. 467; *Taylor v. Lendey*, 9 East, R. 49; *Pool v. Bousfield*, 1 Camp. R. 55.

¹ 4 Black. Comm. 120, 121; 1 Chitty, Crim. Law, 3, 4.

² 4 Black. Comm. 364; 1 Russell on Crimes, B. 2, ch. xiii.

³ *Keir v. Leeman*, 9 Adolph. & Ell. (N. S.) 392.

⁴ *Hodsdon v. Wilkins*, 7 Greenl. 113; *Ayer v. Hutchins*, 4 Mass. 370; *Churchill v. Perkins*, 5 Mass. 541; *Denny v. Lincoln*, 5 Mass. 385; *Webber v. Blunt*, 19 Wend. R. 188.

⁵ *Clark v. Foxcroft*, 6 Greenl. 296.

⁶ *Churchill v. Perkins*, 5 Mass. 541; *Denny v. Lincoln*, 5 Mass. 385; *Ayer v. Hutchins*, 4 Mass. 370; *Hodsdon v. Wilkins*, 7 Greenl. 113.

⁷ *Nichols v. Ruggles*, 3 Day, 145.

binding.¹ But to render a contract void, on the ground that it stifles a prosecution for a criminal offence against the promisor, it is necessary that the promise should be made for gain, and not merely out of weakness or motives of compassion and kindness.² And where an act occasioning only private injury, though criminal in itself, has been already committed, a contract under seal to make satisfaction therefor to the individual injured, in consideration of a waiver of prosecution, would seem to be good.³ Thus, a bond given to a person injured by an assault and battery, to make satisfaction and to prevent prosecution, has been held to be good.⁴ But this exception seems to be doubtful, and at all events only applies to cases where the misdemeanor is purely personal.⁵ If it be a public misdemeanor, no contract to compound or stifle it would be binding.⁶

¹ *Davis v. Arledge*, 3 Hill, S. C. R. 170.

² *Ward v. Allen*, 2 Metcalf, R. 53; *Commonwealth v. Pease*, 16 Mass. R. 91.

³ *Johnson v. Ogilby*, 3 P. Wms. R. 278; *Price v. Summers*, 2 South. 578; *Plumer v. Smith*, 5 N. Hamp. 553; *Stone v. Hooker*, 9 Cowen, 154.. See also *Edgcombe v. Rodd*, 5 East, R. 303.

⁴ *Price v. Summers*, 2 South. R. 578. See also *Kier v. Leeman*, 9 Adolph. & Ell. (N. S.) 371.

⁵ See *Osbaldiston v. Simpson*, 13 Sim. R. 513, where promissory notes delivered by one person to another to induce the latter to forego a prosecution against him for cheating at cards, were decreed to be given up, on the ground that it would be extremely dangerous to allow a party to be a judge in his own cause, and to determine in his own favor, what amount of penalty ought to be paid for a breach of the law committed by another person, notwithstanding he may have suffered from it. See also *Ex parte Critchley*, 3 Dowl. & Lown. 527; 10 Jurist, 112.

⁶ *Wallace v. Hardacre*, 1 Camp. R. 45; *Edgcombe v. Rodd*, 5 East, R. 303; *Johnson v. Ogilby*, 3 P. Wms. R. 279; *Harding v. Cooper*, 1 Stark. R. 467. In *Keir v. Leeman*, 9 Adolph. & Ell. (N. S.) 392, Tindal, C. J., reviews the cases and dicta upon this question. He says: "It seems clear, from the various authorities brought before us on the argument, that some misdemeanors are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of *Collins v. Blan-*

§ 570. A compromise of a *civil* process, or of a private injury is, however, binding; and where an officer accepts a note

tern, which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury. It is difficult to comprehend the case of *Johnson v. Ogilby* as stated in Peere Williams's Reports. There a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanor seems to have been the foundation of the decision, if it was made, by Lord Talbot, a distinction overruled in *Collins v. Blantern*, which was decided at a later period. It is not, indeed, at all clear that the indictment for the fraud was compromised, as a part of the agreement, or that the fraud was an indictable one: and perhaps the case may be so explained. If not, it cannot, we conceive, be sustained as law.

"In *Drage v. Ibberson*, however, Lord Kenyon adverted to, and stated that he should adhere to, the class of cases which held that the consideration for an agreement, being the settling of a misdemeanor, might be good in law. Thus a settlement of an indictment for a nuisance, preferred by public authority, was held a lawful consideration for a bond binding the defendant to remove the nuisance; we presume, on the ground, which however is not very satisfactory, that the main object of the prosecution, the removal of the nuisance, was thereby effected. But the court seem to have overlooked the consideration that a defendant who had infringed a public right was thereby entirely freed from the punishment due to a violation of public law. In *Edgcombe v. Rodd*, Le Blanc, J., assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanor and not for a private injury to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallowes v. Taylor*; nor can *Pool v. Bousfield* be reconciled with it. There an agreement to stifle a motion against the defendant, that he should answer the matters of an affidavit, was held illegal.

"But there is a class of cases, such as *Beeley v. Wingfield*, and *Baker v. Townsend*, which do not at all break in upon sound principles. These are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate. As Gibbs, C. J., in the latter case, well observes, 'the parties have referred nothing but what they have a right to refer. They have referred the several assaults' (by which we understand him to mean their several rights to damages for those assaults); 'these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil

or bond from a prisoner, convicted of a breach of the excise laws, for the purpose of saving his property from sale, or his body from imprisonment.¹ In any case where the imprisonment is not for the purposes of punishment, but only for security of a debt, or an obligation, and the officer accepts bail, it is binding, because his duty is to accept it under such circumstances.² So, also, where the prosecution is merely for fraud, and the parties make a compromise thereof, by which all legal proceedings are agreed to be stopped, it will be binding.³

§ 571. But an agreement with a public officer, to compensate him for doing an act, which it is his legal duty to do, without compensation, is void; because every officer is bound to do his duty, conformably to law.⁴ Thus, a contract with a

rights;’ which words show our previous interpretation to be correct. The case of *Beeley v. Wingfield* was after conviction; and the promissory note seems merely to have been given for the expenses of the prosecution, and was obviously a part of the punishment inflicted by the court after conviction of the offence.

“Indeed, it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further.

“In the case before us, the offence is an assault coupled with *riot* and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence.”

¹ *Pilkington v. Green*, 2 Bos. & Pul. 151; *Sugars v. Brinkworth*, 4 Camp. 46.

² *Churchill v. Perkins*, 5 Mass. 542; *Brett v. Close*, 16 East, 293.

³ *Johnson v. Ogilby*, 3 P. Wms. R. 279.

⁴ *Callagan v. Hallett*, 1 Caines, 104; *Mitchell v. Vance*, 5 Monr. 529; *Bac. Abr. Assumpsit*, E; *Smith v. Whildin*, 10 Barr, R. 39.

branch pilot of New York, to assist a vessel in distress, for a certain extraordinary compensation, was held to be void; because assistance in such cases is, by statute, imposed upon the pilot as a duty; and such a contract might lead to oppression.¹ So, also, demanding and receiving more than the fees prescribed by law, for official duties, is indictable, and the excess may be recovered in an action of assumpsit for money had and received.² So, also, a promise of reward to a constable for arresting a criminal under a warrant which he is legally bound to execute, is void.³ The same rule applies to a promise to pay extra compensation to a witness to attend upon court;⁴ to pay sailors extra wages for doing only their duty;⁵ and generally a promise to pay a person for doing any act, which such person is already bound to do.⁶ The plain ground upon which this rule is founded, is, that the contract is extortionate.⁷

§ 572. All contracts to indemnify officers against prospective non-feasance, malfeasance, or misfeasance of their official duties, are void.⁸ Thus, the rule applies in cases of an agreement to allow a prisoner to escape;⁹ or to indemnify the

¹ *Callagan v. Hallett*, 1 Caines, 104. See also *County Commissioners v. Jones*, 1 Breese, 103.

² *Woodgate v. Knatchbull*, 2 T. R. 148; *Jons v. Perchard*, 2 Esp. R. 507; *Bridge v. Cage*, Cro. Jac. 103; *Badow v. Salter*, W. Jon. 65; s. c. *Latch*, 54; *Dew v. Parsons*, 2 Barn. & Ald. 562.

³ *Smith v. Whildin*, 10 Barr, R. 39.

⁴ *Willis v. Peckham*, 1 B. & B. 515; *Collins v. Godefroy*, 1 B. & Adol. 950; *Sweany v. Hunter*, 1 Murphey, 181.

⁵ *Stilk v. Myrick*, 2 Camp. R. 317; *Harris v. Watson*, Peake, R. 72.

⁶ *Crowhurst v. Laverack*, 16 Eng. Law & Eq. R. 498, and Bennett's note.

⁷ 4 Black. Comm. 141.

⁸ *Doty v. Wilson*, 14 Johns. R. 381; *Given v. Driggs*, 1 Caines Cas. 450; *Kneeland v. Rogers*, 2 Hall, R. 579; *Hodsdon v. Wilkins*, 7 Greenl. R. 113; *Ayer v. Hutchins*, 4 Mass. R. 370; *Churchill v. Perkins*, 5 Mass. R. 541.

⁹ *Featherston v. Hutchinson*, Cro. Eliz. 199; s. c. 3 Leon. 208; *Blithman v. Martin*, 2 Bulst. 213; s. c. Godb. 250.

officer against such escape, if he will permit it;¹ or to deliver an execution debtor to an officer at a future day, in consideration of his forbearing to arrest the debtor, when in his presence and power.² But an agreement by creditors to indemnify a sheriff for not serving an execution, which they intended to impeach as fraudulent, and for the purpose of trying that question, is valid.³

§ 573. If, however, the act, which forms the consideration of a promise, be supposed at the time to be legal, though it afterwards turn out not to be so, a promise of indemnity therefor would be good and binding. Thus, where Harcot brought one Battersey to an inn, and affirmed to the host, that he arrested Battersey by virtue of a commission of rebellion, and requested the host to keep him safely over night, and promised to save him harmless; the promise was held to be binding, though the arrest and imprisonment were illegal.⁴ So, where the commissioner and overseer of highways ordered the plaintiff to pull down a turnpike gate, supposing it to be a nuisance, and promised "to bear him out," the promise was held to be binding.⁵ So, also, a promise to indemnify against an act which turns out to be a trespass, is good, unless the promisee knew the act contemplated to be a trespass.⁶

§ 574. So, also, a promise to indemnify an officer for the execution of an act apparently legal, is good.⁷ As if a bond

¹ *Ayer v. Hutchins*, 4 Mass. 370; *Dive v. Maningham*, Plowd. 60; *Martyn v. Blithman*, Yelv. 197; *Hodsdon v. Wilkins*, 7 Greenl. 113.

² *Denny v. Lincoln*, 5 Mass. 385; *Fanshor v. Stout*, 1 South. 319.

³ *Clarke v. Foxcroft*, 6 Greenl. 296.

⁴ *Bacon, Abr. Assumpsit, E*; *Winch*, 48; *Hutt*, 55; 2 *Johns. Cas.* 56.

⁵ *Coventry v. Barton*, 17 *Johns.* 142; *S. P. Avery v. Halsey*, 14 *Pick.* 174.

⁶ *Stone v. Hooker*, 9 *Cowen, R.* 154. See, also, *Allaire v. Ouland*, 2 *Johns. Cas.* 52; *Avery v. Halsey*, 14 *Pick. R.* 174.

⁷ *Arundel v. Gardiner*, *Cro. Jac.* 652; *Blackett v. Crissop*, 1 *Ld. Raym. R.* 279.

of indemnity be given to a sheriff, for attaching or distraining disputed property. But a promise to indemnify him for doing an act manifestly in violation of his duty, or for omitting to do an act which is plainly his duty, will be void.¹

§ 575. An agreement under seal, however, to indemnify an officer for an illegal act, already done, is valid,² for the same reason as that which obtains in bonds, given in consideration of past cohabitation, namely, that the seal imports a consideration, and that the act being done, no injury can result to the public from a contract to indemnify the party, it being no consideration for the act itself. A parol agreement to the same effect, however, would not be binding, because the consideration is executed.³

§ 576. Again, all secret agreements, which are founded upon violations of public trust or confidence, are void.⁴ Where, therefore, a person occupying a public office, agrees, for a reward, to exercise his official influence in questions affecting both public and private rights, so as to bring about the private advantage of persons interested, the contract would be void. For every public officer is bound to be disinterested in the consideration of all public questions, and any contract, which interferes with the free and unbiased exercise of his judgment in relation to a question of trust or confidence reposed in him, is against public policy and good morals. Thus, where an agreement was made to remunerate commissioners appointed to take testimony, and bound by the nature of their appointment to secrecy, provided they would disclose the tes-

¹ *Wright v. Lord Verney*, 3 Doug. R. 240; *Chitty on Cont.* 678; *Mitchell v. Vance*, 5 Monr. R. 529; *Featherston v. Hutchinson*, Cro. Eliz. 199.

² *Bacon*, Abr. Assumpsit, E; *Hutt.* 55; s. c. *Winch*, 48.

³ *Coventry v. Barton*, 17 Johns. 142; *Avery v. Halsey*, 14 Pick. 174.

⁴ *Fuller v. Dame*, 18 Pick. R. 472; *Pingry v. Washburn*, 1 Aiken, R. 264; *Lord Howden v. Simpson*, 10 Adolph. & Ell. 821. *The Vauxhall Bridge v. Earl Spencer*, 2 Madd. R. 356; s. c. *Jac. R.* 64.

timony so taken, it was held to be void.¹ So, also, if a contract should be entered into between a member of parliament and third persons, by which the former should agree to withdraw all opposition to a certain bill incorporating a railway company, in consideration of £5,000, it would be held to be void.² And the same rule would apply to an agreement by an insolvent to pay a creditor for withdrawing all opposition to his discharge.³ So, also, where A., being a member of the legislature, entered into an agreement with B. to use his influence in the legislature to procure an act of incorporation, for a proposed company, on a certain pecuniary consideration, the agreement was held to be void.⁴ It would seem, however, that whenever a member of parliament or of the legislature has a personal interest in the subject-matter of a question before such parliament or legislature, he may agree to withdraw all opposition thereto growing out of his private and not his public interest, upon a consideration, provided that his agreement be not secret, and do not operate as a fraud or surprise on such body, but be wholly open.⁵ But a contract to procure or endeavor to procure the passage of an act in the legislature by sinister means, or even by using personal influence with the members, is void, as being contrary to public policy and the integrity of political institutions.⁶

§ 577. Again, contracts for the sale of public offices come under this class of contracts in violation of public duty, and are void. And this rule obtains upon the ground, that they

¹ *Cooth v. Jackson*, 6 Ves. 12, 31, 32, 35.

² *Lord Howden v. Simpson*, 10 Adolph. & Ell. 821.

³ *Hall v. Dyson*, 10 Eng. L. & Eq. 424; *Gould v. Williams*, 4 Dowl. P. C. 91; *Murray v. Reeves*, 8 B. & C. 421.

⁴ *Fuller v. Dame*, 18 Pick. R. 473.

⁵ *Lord Howden v. Simpson*, 10 Adolph. & Ell. 821; *Simpson v. Lord Howden*, 1 Keen, R. 583; s. c. 3 Mylne & Craig, R. 97; *The Vauxhall Bridge Co. v. Earl Spencer*, 2 Madd. R. 356.

⁶ *Clippinger v. Hepbaugh*, 5 Watts & Serg. 315. See also *Fuller v. Dame*, 18 Pick. R. 472.

tend to destroy the responsibilities of the office, and to betray the interests of the public.¹ But it would seem that a contract for a private office, of which the other party is cognizant, and does not refuse his assent, would be good, if it were not manifestly productive of injurious results.² So, also, the profits and emoluments of a public office of trust are not a good subject of sale. Thus, it has been held, that the prize money of a sailor, or the full pay or half pay of an officer, is not assignable at law,³ nor in equity,⁴ upon the ground that any salary, paid for the performance of a public duty, ought not to be perverted to other uses than those for which it was intended.

§ 578. Contracts for the maintenance of suits, or for champerty, or embracery, or bribery, or extortion, (which are void

¹ *Blachford v. Preston*, 8 T. R. 89; *Card v. Hope*, 2 Barn. & Cres. 662; *East Ind. Co. v. Neave*, 5 Ves. jr. R. 173; *Thompson v. Thompson*, 7 Ves. R. 470; *Morris v. McCulloch*, Ambler, R. 432; 1 Story, Eq. Jurisp. § 295; *Chesterfield v. Janssen*, 2 Ves. R. 125; *Waldo v. Martin*, 4 Barn. & Cres. 319; *Cardigan v. Page*, 6 N. Hamp. R. 183; *Lewis v. Knox*, 2 Bibb, R. 453. *Nulla aliâ re magis Romana Respublica interiit, quam quod magistratûs officia venalia erant.* Co. Litt. 234, a. In *Filson v. Himes*, 5 Barr, R. 452, there was a covenant to pay a gross sum in consideration of a transfer of certain property, and a promise and guaranty on the part of the vendor, that a post-office should be removed from a neighboring village to the place of business of the vendee, and that he should be appointed to it as postmaster, and it was held, that the bargain was one, the consideration one, the covenant one, and that as the procurement of an appointment to office by private influence was part of the indivisible consideration, and illegal and void on the ground of public policy, the whole was void.

² *Richardson v. Mellish*, 2 Bing. R. 242, 243, 246, 247.

³ *Lidderdale v. Montrose*, 4 T. R. 248; *Flarty v. Odum*, 3 T. R. 681; *Barwick v. Reade*, 1 H. Black. R. 627.

⁴ *Stone v. Lidderdale*, 2 Anstr. R. 533, in which the case of *Stuart v. Tucker*, 2 W. Black. R. 1137, holding the contrary doctrine, is expressly overruled. See *Palmer v. Bate*, 2 Brod. & Bing. 676; *Arbuckle v. Cowtan*, 3 Bos. & Pul. 321; *Flarty v. Odum*, 3 T. R. 681; *Methwold v. Walbank*, 2 Ves. R. 238; *Meredith v. Ladd*, 2 N. Hamp. R. 517; *Cardigan v. Page*, 6 N. Hamp. R. 183.

by common law, and by statute, and are indictable offences,) come under this rule, and are void.¹ Indeed, wherever the contract is to do acts which are illegal and prohibited, it is void, and no action can be maintained on it.² *Maintenance* is the officious assistance by money or otherwise, proposed by a third person to either party to a suit, in which he himself has no legal interest, to enable the party to prosecute or defend it.³ It is not, in the strict sense of the term, maintenance to advance money for, or to agree to pay the costs of a suit, *before* it is commenced, but only after the suit is commenced;⁴ yet the mere fact, that the agreement is made before the suit is commenced, will not render agreements good in equity, which would be void for maintenance, if they had been made after suit was commenced.⁵

§ 579. But the doctrine of the common law as to maintenance does not apply to persons who either have any real interest in the suit promoted by them, or who act in the *bonâ fide* belief that they have. Indeed, the law in this respect has been greatly modified by the late cases, and by the general change of opinions and customs; and maintenance has been said to be now confined to cases where a stranger having no interest in the suit, improperly, for the purpose of stirring up litigation and strife, encourages others to bring actions or make defences

¹ *Hacket v. Tilly*, 11 Mod. 93; s. c. 2 Lord Raymond, 1207; *Fox v. Tilly*, 6 Mod. 225; *Given v. Driggs*, 1 Caines, 450; *Kneeland v. Rogers*, 2 Hall, 579; *Hackett v. Tilly*, Holt, R. 201; *Swett v. Poor*, 11 Mass. 549.

² *Craig v. The State of Missouri*, 4 Peters, S. C. R. 410.

³ 4 Blackstone, Comm. 134; *State v. Wynne*, 1 Hawk. S. Car. 454; *Dyer*, 355 b; Co. Litt. 368; Bac. Abr. Maintenance; *Chitty on Cont.* 675; *Thurston v. Percival*, 1 Pick. 415; *Redman v. Sanders*, 2 Dana, 70; *Brinley v. Whiting*, 5 Pick. 359; *Belding v. Pitkin*, 2 Caines, 147.

⁴ 2 Story, Eq. Jurisp. § 1048, note 2; Russell on Crimes, Book 2, ch. 20, p. 177.

⁵ 2 Story, Eq. Jurisp. § 1048, note 2; *Wood v. Downes*, 18 Ves. R. 125; *Strachan v. Brander*, 1 Eden, R. 303, note; *Arden v. Patterson*, 5 Johns. Ch. R. 44.

which they have no right to make.¹ Advice by any person to institute a suit does not amount to maintenance, unless it appear to have been urged maliciously or without reasonable or probable cause.² So, also, if money be advanced from motives of friendship and charity, and not of speculation, to a poor person, to enable him to prosecute a suit, it is not maintenance.³ The same rule also holds where the person advancing money has any supposed interest in the subject-matter of suit, independent of his advance, whether such interest be great or small, certain or uncertain, vested or contingent; the sole object of the rule as to champerty and maintenance being to prevent entire strangers from fomenting litigation by officious assistance.⁴ If, therefore, there be any privity of interest growing out of peculiar relations of trust or confidence between the parties, independent of the assistance rendered to carry on

¹ *Findon v. Parker*, 11 Mees. & Welsb. 675, 682. Lord Abinger said: "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make. I do not like to give an opinion upon an abstract case, and therefore am not desirous to consider it; but if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money, or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance; I am not prepared to say, that, in modern times, courts of justice ought to come to that conclusion. However, I give no opinion upon that point. In this case I proceed upon the ground, that there was reasonable evidence of a common link of interest uniting the proprietors of the lands in question, at the time they made the agreement." See also *Flight v. Leman*, 4 Adolph. & Ell. (N.S.) 883; *Pechell v. Watson*, 8 Mees. & Welsb. 691; *Hunter v. Daniel*, 9 Jur. (1845,) 526; *Thallhimer v. Brinckerhoff*, 3 Cowen, R. 647.

² *Ibid.*

³ *Master v. Miller*, 4 T. R. 340; *Perine v. Dunn*, 3 Johns. Ch. R. 508; *Thurston v. Percival*, 1 Pick. R. 417; *Baker v. Whiting*, 3 Sumner, R. 475.

⁴ *Wickham v. Conklin*, 8 Johns. R. 220; *Thallhimer v. Brinckerhoff*, 3 Cow. R. 647. See *Call v. Calef*, 13 Metcalf, 362.

the suit, — as if they stand in relation of landlord and tenant, father and son, master and servant, husband and wife,¹ — mere assistance by money or services, would not amount to maintenance. And this rule would also embrace the relation of attorney and client, if there were no ingredient of champerty to poison the contract.² Maintenance is, however, to be carefully distinguished from champerty, and only constitutes a part of it; and if there be no bargain for an interest or share of the subject-matter of the suit, money advanced or assistance rendered will often be a good consideration for a contract, when, if such were not the case, the consideration would be bad.³

§ 580. Embracery is another species of maintenance, and consists of any practices by which it is attempted to influence a jury corruptly to one side, whether it be by promises, persuasions, entreaties, money, entertainments, or the like, and avoids a contract made in consideration thereof.⁴ Nor does it matter whether the jury be actually influenced or not; the attempt alone constitutes the offence. And if money be given to any person to be distributed by him as a bribe to the jury, it constitutes embracery, although the money be not distributed. Wherever a person, from his relationship to the parties, is justified in maintaining a suit, he may exercise his influence to persuade or labor a juror to appear and give a verdict according to his conscience; but a mere stranger cannot do even this.⁵

¹ Ibid. *Moore v. Usher*, 7 Sim. R. 384; 4 Black. Comm. 135; Story, Eq. Jurisp. § 1049; *Williamson v. Henley*, 6 Bing. R. 299; 1 Russell on Crimes, 177, ch. 20, Book 2.

² *Thallhimer v. Brinckerhoff*, 3 Cowen, R. 647, supra.

³ 1 Russell on Crimes, Book 2, ch. 20, p. 176; *Strange v. Brennan*, 10 Jurist, 649.

⁴ 1 Russell on Crimes, B. 2, ch. 21, p. 183; 1 Hawk. P. C. c. 27, 466; 4 Black. Comm. 140.

⁵ 1 Russell on Crimes, B. 2, ch. 21, p. 183; 1 Hawk. P. C. c. 27, 466; 4 Black. Comm. 140.

§ 581. Champerty, as distinguished from maintenance, is a bargain for an interest in a share of the subject-matter of a suit, in case it prevail, in consideration that the champertor advance money or carry on the suit at his own expense,¹—while maintenance does not involve any agreement for an interest in the subject-matter. Champerty is, therefore, maintenance, and something more, and is frowned upon both by law and equity, as tending not only to foment litigation, but to pervert the objects of the law.² Thus, where an attorney, after rendering some service in a suit brought by the defendant, entered into an agreement with him, by which he was to receive ten per cent. upon the sum recovered, the agreement was held to be void for champerty.³ So, also, the assignment to a navy agent of part of the subject of a prize suit then depending, in consideration of his paying the costs thereof, was held to be void for champerty. It is not confined to advances of money, in consideration of a division of the subject-matter of suit, but embraces all modes of assistance furnished on such consideration. Thus, an agreement to give up certain securities, or to communicate certain information, or to procure evidence, upon condition of receiving a portion of the sum recovered, is champerty.⁴ Nor does the rule in equity differ from that which obtains at law: in both tribunals champerty constitutes a complete defence to a contract.⁵

¹ 2 Inst. 564; 2 Roll. Abr. 116; Bacon, Abr. Maintenance, B. 5; In Re Masters, 4 Dowl. 18; 1 Russell on Crimes, B. 2, ch. 20, p. 179.

² 2 Story, Eq. Jurisp. § 1049; Strachan v. Brander, 1 Eden, R. 303, and note; Arden v. Patterson, 5 Johns. Ch. R. 44, 48; Wood v. Griffith, 1 Swanst. R. 55; Wallis v. The Duke of Portland, 3 Ves. jr. R. 494; Holloway v. Lowe, 7 Porter, R. 488.

³ Thurston v. Percival, 1 Pick. R. 415. See also Spencer v. King, 5 Ham. 183; Lathrop v. Amherst Bank, 9 Metcalf, R. 489; Byrd v. Odem, 9 Ala. R. 755; Satterlee v. Frazer, 2 Sandf. 141.

⁴ Stanley v. Jones, 7 Bing. 369; Hartley v. Russell, 2 Sim. & Stu. 244.

⁵ 2 Story, Eq. Jurisp. § 1049; Strachan v. Brander, 1 Eden, R. 303, and note; Arden v. Patterson, 5 Johns. Ch. R. 44, 48; Wood v. Griffith, 1 Swanst. R. 55; Wallis v. The Duke of Portland, 3 Ves. jr. R. 494.

§ 582. There is another species of champerty, which consists in buying or selling a pretended or doubtful title to land not in possession of the seller, but held adversely by another person.¹ In such a sale it is immaterial whether the title of the vendor be good or bad, if the land be held adversely to him.² But where the party selling land does not know that there is an adverse possession, he would not be liable to the statute penalty for selling the pretended title, even although he should know that there was an adverse claim.³ So, also, where an executory contract is made for the sale of land, while the vendor is in peaceable possession, a deed in pursuance thereof afterwards given, when the land is in adverse possession, is not void for champerty.⁴ But the purchase of an estate which is in suit, if made with a knowledge that it is in suit, is void for champerty, unless it be made in consummation of a previous bargain, or be founded on the ties of blood.⁵

§ 583. This rule does not, however, apply to sales or assignments of personal property or choses in action. In relation to personal property, the rule is that any debt or claims may be assigned after the institution of a suit for the recovery thereof, unless the assignment savor of maintenance, as if it be made

¹ *Whitaker v. Cone*, 2 Johns. Cas. 58; *Brinley v. Whiting*, 5 Pick. R. 355; 1 *Russell on Crimes*, Book 2, ch. 20, p. 181; *Dexter v. Nelson*, 6 Alab. R. 68; *Martin v. Pace*, 6 Blackf. R. 99; *Williams v. Hogan*, 1 Meigs, R. 187; *Ring v. Gray*, 6 B. Monroe, R. 368; *Burhans v. Burhans*, 2 Barb. Ch. R. 398; *McGoon v. Ankeny*, 11 Illinois, 558. But see *Edwards v. Parkhurst*, 21 Verm. 472; *Dunbar v. McFall*, 9 Humph. 505.

² *Tomb v. Sherwood*, 13 Johns. R. 289.

³ *Etheridge v. Cromwell*, 8 Wend. R. 629; *Hassenfrats v. Kelly*, 13 Johns. R. 466; *Le Roy v. Veeder*, 1 Johns. Cas. 417; *Preston v. Hunt*, 7 Wend. R. 53; *Sessions v. Reynolds*, 7 Sm. & Marsh. 132.

⁴ *Chiles v. Conley*, 9 Dana, R. 385.

⁵ *Jackson v. Ketchum*, 8 Johns. R. 482; *Jackson v. Andrews*, 7 Wend. R. 152; *Murray v. Ballou*, 1 Johns. Ch. R. 573; *Hawk. B. 1*, c. 27, tit. Champerty; *Mowse v. Weaver*, Moore, R. 655; 4 Kent, Comm. Lect. 67, p. 449.

on condition that the suit shall be prosecuted, or if the assignee undertake to pay costs, or make advances beyond the mere support of the exclusive interest he has so acquired.¹

§ 584. At law, whenever a debt is assigned, suit should be brought in the name of the original creditor, unless there be a privity between the debtor and the assignee.² But it is the policy of courts of equity to uphold assignments, when *bonâ fide* made, and to enable the assignee to sue in his own name, and enforce payment of the debt directly against the debtor, making him, as well as the assignor, (if necessary,) a party to the bill.³

§ 585. There is another class of contracts, coming under this head, the object of which is a violation of the laws of another nation, which should, upon principle, be treated as utterly void, but which has never been directly pronounced to be void by any court of common law, and, therefore, seems to form an exception to the general rule. It is greatly to be regretted that this class of cases should not be embraced within that lofty principle of law which annuls every contract having the taint of immorality, and that the common law of England should crouch before the dictation of its commercial interests, so far as to permit its courts to be polluted by contracts which are founded in any species of fraud, bad faith, and immorality. In this respect, England and America may well receive a lesson from the principle, which is boldly enunciated in the Roman code. *Pacta, quæ*

¹ *Harrington v. Long*, 2 Mylne & Keen, 590, 592; *Thalhimer v. Brinckenhoff*, 3 Cowen, R. 647; 2 Story, Eq. Jur. § 1050; *Williams v. Protheroe*, 5 Bing. 309.

² Ante, § 376 *e*, et seq. See 2 Story, Eq. Jurisp. § 1041, and cases cited.

³ 2 Story, Eq. Jurisp. § 1057; *Ex parte South*, 3 Swanst. R. 393; *Wood v. Griffith*, 1 Swanst. R. 56; *Hartley v. Russell*, 2 Sim. & Stu. 244; *Williams v. Protheroe*, 5 Bing. 309; *Leslie v. Guthrie*, 1 Bing. N. C. 697; *Malcolm v. Charlesworth*, 1 Keen, R. 63; *Spring v. South Car. Ins. Co.* 8 Wheat. R. 268.

*contra leges constitutiones-que, vel contra bonos mores, fiunt, nullam vim habere, indubitati juris est.*¹ The broad principles of international law seem to demand that universal comity, by which no one nation shall connive at the infraction of the laws of another. The highest policy of a people, as of an individual, is honesty. It is, also, the highest morality, which is far better; and, in an age in which commercial and maritime intercourse is so extended, as to draw all nations closer into a peaceful brotherhood of interest and feeling, and to smooth the asperities of political economy, this doctrine deforms the whole system of international jurisprudence.

§ 586. No nation can be justly called upon actively to enforce all the municipal regulations of another nation; for this would be not only beyond the proper sphere of its duties, but would be an adoption of the foreign law. But, at least, it would seem desirable, that the law should not, by the enforcement of contracts, having for their object the infringement of a foreign law, afford opportunities, and multiply motives for acts, which are, at best, contrary to the private duty of the individual, and to the public right of the foreign nation. If the right of one nation to regulate its own commerce, by its own legislation, be recognized,—to enforce a contract, made anywhere, in violation of its legal provisions, is to attack its right, or, at least, its power to carry that right into effect. And, therefore, when a wealthy and powerful nation enforces such contracts, it tyrannizes over the weaker. Such a principle tends to provoke retaliation, and retaliation generates a multitude of evils, and awakens bad passions, which interfere with the interests of both countries. Indeed, if it were carried to its ultimate results, it would create a national right of remonstrance and even of war; but operating, as it does, only occasionally, and secretly, and under the shadow of suspicion and immorality, it is productive of less practical

¹ Code, Lib. 11, tit. 2, § 6.

evils in its results, but is not therefore the less repugnant to principle.

§ 587. There seems, in truth, to be no great difficulty in refusing to enforce a contract, which is intended to violate the laws of another country, upon the ground, that the consideration is immoral. That it is the duty of every person in his intercourse with a foreign nation to conform to its laws, is manifest; that it is a violation of his duty not to do so, is a correlative proposition. In the discussion of these cases, therefore, the question, how far one nation is bound to observe the laws of another nation, need not be determined. There is an easier solution of all difficulty, lying in the question whether the contract be founded upon a sufficient consideration. If it be immoral, it is not, and therefore is void. Then the only question is, whether a violation of private duty is immoral. Besides, such contracts tend to familiarize the mind with fraud, and to weaken the force of legal obligation, and therefore should be rejected as void upon grounds of public policy. They are, in the quaint language of Lord Chief Justice Wilmot, contracts "to do that, which is injurious to the community, and the reason why the common law says that such contracts are void, is for the public good. You shall not stipulate for iniquity."

§ 588. Whether the doctrine contended against would govern in every case, in which a contract is in violation of the laws of another nation, than that wherein it was made, seems to be doubtful. But there is one class, which embraces nearly all of the cases, to which the principle applies, — namely, contracts in violation of the revenue laws of another country, — which is undoubtedly governed by this doctrine. The settled rule of law is, that no nation is bound to pay any regard to the revenue laws of another nation; and all contracts are treated, as if such laws did not exist. This doctrine was first allowed by Lord Hardwicke, in a case, where the plaintiff shipped, by the defendant, a quantity of gold from Portugal,

in violation of the laws of Portugal, by which such an importation was forbidden. The defendant refused to deliver the gold upon arriving at London, which was the port of destination; and it was held to be no objection to the contract, that it was in respect of an unlawful trade.¹ The grounds of this decision were, that the public necessity required the importation of bullion, and that, however it might be by the law of Portugal, by the law of England the trade was not only legal, but very much encouraged. So, also, where the plaintiff (being a Frenchman) sold to the defendant (a British subject) certain goods, and the defendant gave a bill of exchange therefor, which was sued in the Court of Exchequer in England, it was held that the plaintiff could recover.² This doctrine, how-

¹ *Boucher v. Lawson*, Cas. Temp. Hardwicke, 189. See, also, *Planchè v. Fletcher*, Doug. 252. In this case, the voyage was evidently connived at by France, and favored by the English policy, for the purpose of exporting French goods. See, also, *Lever v. Fletcher*, 1 Marsh. Ins. 58 to 61; *Holman v. Johnson*, Cowp. 341; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Randall v. Van Rensselaer*, 1 Johns. R. 94; *Lightfoot v. Tenant*, 1 Bos. & Pul. 551; *Story*, Comm. Conflict of Laws, § 257.

² *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 311. In this case, Lord Abinger said: "It is perfectly clear that where parties enter into a contract to contravene the laws of their own country, such a contract is void; but it is equally clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this; except, indeed, that where he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country. It would have been most unfortunate if it were so in this country, where, for many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other states. The distinction is where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise, there he must take the consequences of his own act; but it has never been said that merely selling to a party who means to violate the laws of his own country is a bad contract. If the position were true which is contended for on the part of the defendant, that this appears upon the plea to have been a contract for the express purpose of smuggling the goods, it would follow that it would be a breach of the contract if the goods were not smuggled; but nothing of the

ever, although firmly established by the whole weight of subsequent decisions, has been repeatedly and vehemently reprobated, as inconsistent with good faith, and repugnant to good morals. Nevertheless, it has found its advocates, and is defended by Valin and Emerigon;¹ the latter, for want of a reason, resorting to the contemptible excuse, that smuggling is a vice common to all nations. Pothier, however, has decidedly condemned it, and he has been strongly seconded by many of the ablest writers.²

kind appears upon the plea; it only states a transaction which occurs about once a week in Paris; the plaintiff sold the goods, the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract of which the smuggling was an essential part." See *Kohn v. Schooner*, 5 Louis. Ann. R. 25.

¹ 2 Valin, Comm. Art. 49, p. 127; 1 Emerigon, ch. 8, § 5, p. 212, 215, 218, (edit. par Boulay Paty.)

² Pothier, Assur. ii. 58; note of Estrangin. Mr. Justice Story, in his Commentaries on the Conflict of Laws, § 257, in stating the common law rule says: "An enlightened policy, founded upon national justice, as well as national interest, would seem to favor the opinion of Pothier in all cases, where positive legislation has not adopted the principle, as a retaliation upon the narrow and exclusive revenue system of another nation. The contrary doctrine seems, however, firmly established in the actual practice of modern nations, without any such discrimination, too firmly, perhaps, to be shaken, except by some legislative act abolishing it." So, also, Chancellor Kent has taken ground with Pothier. He says: "It is certainly matter of surprise and regret, that in such countries as France, England, and the United States, distinguished for a correct and enlightened administration of justice, smuggling voyages, made on purpose to elude the laws, and seduce the subjects of foreign states, should be countenanced, and even encouraged, by the courts of justice. The principle does no credit to the commercial jurisprudence of the age." So, also, Mr. Marshall and Mr. Chitty have added the sanction of their judgment to the doctrine as contended for by Pothier; 1 Marsh. Ins. 59 to 61, (2d ed.) Mr. Chitty says: "There is something in these decisions to which a liberal mind cannot readily assent; and the impropriety of them seems to have been hinted at by Lord Kenyon, in the before-mentioned case of *Weymell v. Reed*. It is impossible not to feel a greater inclination towards the opinion of Pothier, who observes, 'that a man cannot carry on a contraband trade in a foreign country, without engaging the subjects of that country to commit an offence against the laws which it is their duty to obey; and it is a crime of

USURY.

§ 589. In the next place, usurious contracts are void. Usury is defined by Sir Edward Coke to be "a contract upon a loan of money, or giving days for forbearing of money, debt, or duty by way of loan, chevisance, shifts, sales of wares, or any other doings whatsoever."¹ In the usual acceptance of the term it signifies the illegal rent of money.

§ 590. Usury was held in abhorrence in England at as early a date as the reign of Alfred, and the severest powers of the king and the church were exerted against the usurer.² The Jews, who chiefly pursued the trade in money, were on this account not only branded with infamy and disgrace, but were fined, imprisoned, and banished the realm, while the Christians

moral turpitude to engage a man to commit a crime; that a man, carrying on commerce in any country, is bound to conform to the laws of that country; and therefore to carry on an illicit commerce there, and to engage the subjects of that country to assist him in so doing, is against good faith; and consequently a contract made to favor and protect this commerce is peculiarly unlawful, and can raise no obligation.' If our law be justifiable in protecting these transgressions, it can be only on the plea of necessity. But where is the necessity? Shall we be told, that it is impossible to ascertain in the English courts the complex provisions of another country's revenue law? Surely, this argument can avail but little, when it is recollected, that in all cases where the argument is not convenient, the law of another country, however complex, is the rule by which contracts negotiated in that country are tried and construed. It may be true, that the rule of our law was adopted by way of retaliation for the illiberal conduct of other states, and is continued from a cautious policy. But a cautious policy in a great state is but too often a narrow policy; and, after all, the best policy for a state, as well as for an individual, will perhaps be found to consist in honesty and honorable conduct. Indeed, the system is so directly opposite to the clear principles of right feeling between man and man, that nothing could have withheld the states of Europe from concurring for its total abrogation, except the smallness of the gain or loss, that attends upon it." See, also, *La Jeune Eugenie*, 2 Mason, R. 459, 461.

¹ 3 Inst. 150, c. 78.

² *Comyn on Usury*, 2; 2 Roll. Abr. 800; *Saunderson v. Warner*, 2 Roll. R. 240.

were forbidden, under the severest penalties, from pursuing it. It seems to be doubtful, however, whether all loans of money for rent were prohibited by common law, or whether only Jewish usury, which was forty per cent., was prohibited. Sir Edward Coke says, that "it appeareth that, by the ancient laws of the realm, usury was unlawful and punishable."¹ And the authority he cites seems to establish his assertion. But Chief Justice Hale thought that all usury was not against common law, but only Jewish usury.² At all events, by the statutes of 3 Henry VII. and 11 Henry VII., all usury is, in the words of Sir Edward Coke, "damned and prohibited." After the enactment of these statutes, however, public opinion began gradually to change upon this subject, and in the 37th year of the reign of Henry VIII. an act was passed sanctioning the taking of interest on loans of money, and limiting it to the amount of ten per cent. per annum, but providing that any person taking more than such sum should forfeit for every offence the treble value of the money, &c., forborne, and suffer imprisonment. But the effects of this statute not being found to be beneficial, or to serve to prevent excessive usury, it was repealed by the statute 5 & 6 Edward VI., ch. 20, and usury was entirely forbidden, under penalty of a forfeiture of the sum lent, and of the usury. The statute of 13 Elizabeth, c. 8, reëstablished, however, the statute of Henry VIII., and fixed the legal rate of interest at ten per cent. This percentage was afterwards reduced by the statute of 21 James I. c. 17, to eight per cent.; by the 12th of Charles II. c. 13, to six per cent.; and by the 12 Anne, c. 16, to five per cent., which at present regulates the law of interest in England. The rate of interest generally permitted by statute in the United States is six per cent.

§ 591. In order to constitute the offence of usury, there

¹ 3 Co. Inst. 152.

² Hard. 420.

must be, 1st. A loan; 2d. It must be for more than legal interest; 3d. The principal must be to be returned at all events.

§ 592. In the first place there must be a loan. It is not, however, necessary that the transaction should be a formal loan; for if it be, to all intents and purposes, the same thing as a loan, it is of no consequence that it is effected under cover of a fictitious sale, or of any other mere formality of proceeding.¹ Thus, where B., through an agent, applied to C. to borrow a sum of money at an interest of fifteen per cent. per annum, to be secured in a mortgage and lot; and C. replied that he was willing to advance the money, but would have nothing to do with a mortgage, but that he would purchase the property for the sum required, and would rent it to B. for a rent equivalent to fifteen per cent. on the sum advanced, with a privilege to B. to redeem the property for the sum advanced on paying up the rent; and this proposition was acceded to; it was held to be a usurious contract, the form in which it was put being merely a device for the evasion of usury.² So, also, wherever money and goods are advanced together, or goods are advanced alone, to be taken at a specified price; and at the end of a certain time, a sum equal to the price at which the goods are valued is to be returned, together with the money, the contract will be usurious, if it be manifestly intended as a loan, and if the value affixed to the goods be nominal or excessive, so as to have the effect of usury. Thus, where the plaintiff, being desirous to raise a sum of money, applied to B., who advanced him a certain number of silks to sell and raise money upon, for which the plaintiff gave a note for £2,224, and the goods were sold under the direction of the defendants

¹ *Scott v. Lloyd*, 9 Peters, R. 418, 445; *U. S. Bank v. Waggener*, 9 Peters, 400; *Lloyd v. Scott*, 4 Peters, R. 224; *Douglas v. M'Chesney*, 2 Randolph, R. 109; *Chesterfield v. Janssen*, 1 Wils. R. 292; *Lowe v. Waller*, Doug. 736; *Comyn on Usury*, sect. 8, p. 94; *Davis v. Hardacre*, 2 Camp. R. 375; *Agricultural Bank v. Bissell*, 12 Pick. 586.

² *Tyson v. Rickard*, 3 Har. & J. 109.

for £799; it was held, that this contract was in substance an usurious loan, and was void.¹ Again, the mere forbearance to exact money held by another person at the time at which it is due, upon an express or implied agreement that more than legal interest shall be paid, is treated as an usurious loan.²

§ 593. In all such cases, where the usury does not appear on the face of the contract, the question whether the contract is a *bonâ fide* sale, or merely a cover for a loan, is for a jury to decide, in view of the circumstances of the case. And if they find that it is essentially a loan, it will be void for usury.³

¹ *Barker v. Vansommer*, 1 Brown, Ch. R. 151. In this case the Lord Chancellor said: "It is argued by one gentleman that this was a mere sale, that, therefore, the court cannot look into it. I allow that, if this was in the common course of trade, it would be so. That was the reason upon which the Court of Exchequer refused relief in the Duke of Ancaster's case. But I am to inquire whether, under the mask of trading, this is not a method of lending money at an extraordinary rate of interest. There is no doubt that if they had talked of this as a loan of money, there would have been an end of the case. The question, then, is only whether there is any method of showing the court that they meant so, short of their treating of it as such, in plain language. There is not a doubt that, in this case, the transaction was merely for the purpose of raising money, to supply the necessities of this young man. Do they deny knowing the goods were to be sold? I take it, therefore, as an advancement of goods, instead of money, to supply his necessities. It is a question of more difficulty, what is the sum, of which the account is to be taken, whether the value of the goods, or the sum really made. In the case in Eq. Abr. 91, the court thought proper to charge the person only with what he really made of the goods, and this is the proper rule; for the person advancing the goods, knows that they are not to be sold in the shop, but in the lump, at a different kind of market, and that what can be got for them, in that way, is all that will redound to the benefit of the party to whom they are advanced; this lays out of the case the value they were of, to be sold in the shop."

² *Scott v. Lloyd*, 9 Peters, R. 440; *Floyer v. Edwards*, Cowp. R. 113. See *Gray v. Belden*, 3 Florida R. 110; *Craig v. Hewitt*, 7 B. Monroe, 476.

³ *Tate v. Wellings*, 3 T. R. 535; *Train v. Collins*, 2 Pick. R. 145, 152; *Scott v. Lloyd*, 9 Peters, R. 445; *Stevens v. Davis*, 3 Metcalf, R. 211; *Andrews v.*

The mere fact, however, that goods are advanced to enable a person to raise money upon them, creates of itself a presumption that the transaction is usurious,¹ unless the circumstances indicate a willingness on the part of the person to whom they are advanced, to take them, and an expectation on his part of making a profit thereby.² Although, however, such a contract cannot be recovered upon, yet, if goods be advanced, the person to whom they are advanced is liable for the sum, which they actually bring, but not for their value at the time of the transaction; for the person advancing them knows that they are to be sold in a different place, and at once, and that the price they actually bring is all the benefit that the other party will receive from them.³ And, therefore, the law understands the contract to be a sale of goods for such a price as the first vendee shall acquire by a subsequent sale.

§ 594. In the next place, the loan, to be usurious, must be for more than the legal rate of interest. But if the contract be a mere device to secure an illegal rate of interest, it is equally usurious, whatever be its form. Thus, the mere form of a transfer of goods or stock, or of a discount of notes, or of an annuity, will not make a contract good, which is in substance and intent of the parties an usurious loan.⁴ If, therefore, a note, payable in gold and silver, be taken for the full

Pond, 13 Peters, R. 65; *Thomas v. Catheral*, 5 Gill & Johns. 23; *Tregoning v. Atteborough*, 7 Bing. R. 97.

¹ *Davis v. Hardacre*, 2 Camp. N. P. C. 375; *Richards v. Brown*, Cowp. R. 770; *Rich v. Topping*, 1 Esp. N. P. C. 176.

² *Coombe v. Miles*, 2 Camp. N. P. C. 553.

³ *Browning v. Morris*, Cowp. R. 792; *Pit v. Cholmondeley*, 2 Ves. R. 567; *Ex parte Scrivener*, 3 Ves. & Bea. 14; *Scott v. Nesbit*, 2 Bro. Ch. R. 641; *Barker v. Vansommer*, 1 Bro. Ch. R. 152; *Hindle v. O'Brien*, 1 Taunt. R. 413; *Smith v. Bromley*, Doug. R. 696; *Bond v. Hays*, 12 Mass. R. 34; 1 Story, Eq. Jur. § 298, note, § 301, 302; *Skip's case*, 2 Ves. R. 489.

⁴ *Tate v. Wellings*, 3 T. R. 531; *Smedley v. Roberts*, 2 Camp. R. 607; *Stribbling v. The Bank of the Valley*, 5 Randolph, R. 132; *Barker v. Vansommer*, 1 Brown, Ch. R. 149.

face of depreciated paper, which is lent, it will constitute usury.¹ So, also, if a note be antedated for the purpose of enabling the payee to receive more than legal interest, it is usurious.² So, also, where money was lent to a brewer, who, in consideration thereof, agreed to pay to the lender a salary as clerk in the brewery; more than equal in amount to the legal interest on the sum lent, it was held to be an usurious contract.³ So, also, if a man lend £100 for a year on legal interest, and at the same time compel the borrower to take a loan of a house at £60 rent, which is not worth £20, the contract is usurious, it being a mere device to evade the statute.⁴ And so, where a bonus is deducted out of the original loan, though six per cent. interest only be secured, yet, as the loan is reduced by the bonus, interest on the full sum would be more than six per cent. on the actual sum lent, and, therefore, usurious.⁵ Nor does it make any difference, whether the illegal interest is to be paid in money or in goods; the rule applies in both cases.⁶

§ 595. Again, where the lender discounts the bill or note of the borrower, deducting more than legal interest, the contract will be void, if it be a mere cloak to cover a loan.⁷ But although the discounters is in such case generally restricted to taking merely legal interest, he may, nevertheless, charge a reasonable sum in addition as a remuneration for any trouble,

¹ *Bank of U. S. v. Owens*, 2 Peters, R. 535; *Valley Bank v. Stribling*; 7 Leigh, R. 36.

² *Williams v. Williams*, 3 Green. R. 255.

³ *Wright v. Wheeler*, 1 Camp. R. 165, n.

⁴ *Saunders's Case*, Shep. Touch. 62; *Douglass v. M'Chesney*, 2 Randolph, R. 109.

⁵ *Whitney v. Tyler*, 12 Metcalf, R. 193.

⁶ *Tyson v. Rickard*, 3 Har. & John. 109; Comyn on Usury, sect 15, p. 160.

⁷ *Massa v. Dauling*, 2 Strange, R. 1243; *Bank of U. S. v. Owens*, 2 Peters, R. 537; *Powell v. Waters*, 8 Cowen, 669; *Matthews v. Griffiths*, Peake, N. P. C. 200.

expense, or inconvenience, to which he may be put.¹ It should, however, clearly appear that the additional compensation was reasonable, and was not a mere device to evade the statute; or it will not be allowed.² Thus, a banker, bill-broker, or other person, discounting a bill, may charge a reasonable commission for his trouble; but if the commission be unreasonable or a mere pretence to obtain more than legal interest, the contract will be usurious. Where, therefore, the holder of a note for \$1,000 payable to himself, requested another person to get it discounted, who by indorsing it procured it to be done, and paid over the avails, except thirty dollars, which he retained for his indorsement and services, it was held that the transaction was usurious, and that the usury might be alleged in bar of a recovery of a subsequently substituted note.³ The mere fact, however, that interest on a bill of exchange is taken in advance will not of itself make a loan usurious, if it be done *bonâ fide* and in the ordinary course of business,⁴ but the circumstances of the case may render it usurious. Whether the transaction be a *bonâ fide* discount in the way of trade, or a loan of money made with an intent to exact usurious interest, is a question for a jury.⁵

¹ *Auriol v. Thomas*, 2 T. R. 52; *Hutchinson v. Piper*, 4 Taunt. R. 810; *Baynes v. Fry*, 15 Ves. jr. 120; *Comyn on Usury*, sect. 12; *Lyman v. Morse*, 1 Pick. R. 295, note.

² *Masterman v. Cowrie*, 3 Camp. R. 488; *Lee v. Cass*, 1 Taunt. R. 511; *Hammett v. Yea*, 1 Bos. & Pul. 144; *Scott v. Lloyd*, 9 Peters, R. 440; *Kent v. Lowen*, 1 Camp. R. 178; *Comyn on Usury*, sect. 12; *Stevens v. Davis*, 3 Metcalf, R. 211.

³ *Steele v. Whipple*, 21 Wend. R. 103. See also *Seymour v. Strong*, 4 Hill, R. 255; *Seneca County Bank v. Schermerhorn*, 1 Denio, R. 133.

⁴ *New York Fire Ins. Co. v. Ely*, 8 Cowen, R. 678; *N. Y. Fire Ins. Co. v. Sturgis*, 8 Cowen, R. 664; *Marsh v. Martindale*, 3 Bos. & Pul. 154; *Agricultural Bank v. Bissell*, 12 Pick. R. 586; *Utica Ins. Co. v. Bloodgood*, 4 Wend. R. 652; *Bank of Utica v. Phillips*, 3 Wend. R. 408; *Thornton v. Bank of Washington*, 3 Peters, R. 40.

⁵ *Ibid.* *Marsh v. Martindale*, 3 Bos. and Pul. 154; *Masterman v. Cowrie*, 3 Camp. R. 488; *Lyman v. Morse*, 1 Pick. R. 295, note.

§ 595 *a*. A *bonâ fide* sale of negotiable securities is, however, valid, for the mere inequality of price is not sufficient to vitiate a sale.¹ So, also, the *bonâ fide* sale of one's credit by way of guaranty; or by making a note for another's accommodation, though for a compensation exceeding seven per cent. has been held not to be usurious, if the transaction be unconnected with a loan between the parties.²

§ 596. Contracts, by which compound interest is secured, are not, in themselves, necessarily usurious. And parties may agree to settle accounts at stated times, and to turn any balance of interest due at such times into principal.³ So,

¹ *Powell v. Waters*, 8 Cowen, R. 669; *Nichols v. Fearson*, 7 Peters, R. 103; *Cram v. Hendricks*, 7 Wend. R. 569; *Churchill v. Suter*, 4 Mass. R. 156; *Bridge v. Hubbard*, 15 Mass. R. 96; *French v. Grindle*, 15 Maine R. 163; *Braman v. Hess*, 13 Johns. R. 52; *Munn v. Commission Co.* 15 Johns. R. 44; *Lane v. Steward*, 20 Maine R. 98; *Holford v. Blatchford*, 2 Sandf. Ch. R. 149.

² *More v. Howland*, 4 Denio, R. 264, (Beardsley, J. dissenting); *Mazuzan v. Mead*, 21 Wend. R. 285; *Ketchum v. Barber*, 4 Hill, R. 224.

³ *Wilcox v. Howland*, 23 Pick. R. 167; *Hamilton v. Le Grange*, 2 H. Black. R. 144; s. c. 4 T. R. 613; *Newal v. Jones*, M. & M. 449; *Eaton v. Bell*, 5 Barn. & Ald. 34; *Mowry v. Bishop*, 5 Paige, R. 98; *Ex parte Bevan*, 9 Ves. R. 223. In this case Lord Eldon said, "As to the question of compound interest, it is clear, you cannot *a priori* agree to let a man have money for twelve months, settling the balance at the end of six months; and that the interest shall carry interest for the subsequent six months; that is, you cannot contract for more than five per cent., agreeing to forbear for six months. But, if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate, that you will forbear for six months upon those terms, that is legal. So this is legal between merchants, where there is no agreement to lend to either, but they stipulate for mutual transactions, each making advances; and that, if at the end of six months the balance is with A., he will lend to B; and *vice versâ*. That sort of transaction has taken place. I admit, generally, that cannot be applied to the case of a real security; and you may not, when the debt comes to a certain sum, take a real security and five per cent. I do not know, if that would do in a mercantile transaction. It is not enough to say in this case, that these accounts have been settled from half year to half year; and therefore it is

also, an agreement to pay interest annually or semiannually, making rests at such times, and to add the interest then due to the principal, and treat this whole sum as principal, is valid.¹ So, also, where there is no antecedent agreement, and after interest becomes due, a promise is made to pay interest thereon, in consideration of forbearance, it is good.² But if no antecedent agreement be made to settle accounts at stated times, or to make rests, and then to turn the interest into principal, if the person to whom the interest is due lets the time when it is payable pass without exacting payment, he cannot, in an action on the contract, recover compound interest.³

§ 597. Ignorance of the law will not excuse a party from the penalties of usury, if his contract be, in fact, usurious.⁴ But where there was no intention to evade the law, a mere mistake of *fact*, resulting from accident, by which more than legal interest is allowed or taken, will not utterly vitiate the contract, but only afford a ground to reduce the sum to the legal rate.⁵ Thus, where an agreement was made on the 23d of May, 1617, to lend £20, for a year, and the scrivener, in drawing up the bond for repayment, made it payable on the 24th of May next ensuing; it was held, that, as this was

legal to take interest in this way; for the transactions may be evidence of previous agreement." See also *Morgan v. Mather*, 2 Ves. jr. R. 20; *Marsh v. Martindale*, 3 Bos. & Pul. 154; *Comyn on Usury*, sect. 14, and cases cited; *Caliot v. Walker*, 2 Anstr. 495; *Bainbridge v. Wilcocks*, 1 Baldw. R. 538; *Kellogg v. Hickok*, 1 Wend. R. 224.

¹ *Ibid.*

² *Ibid.*; *Eaton v. Bell*, 5 Barn. & Ald. 34; *Newal v. Jones*, M. & M. 449; *Wilcox v. Howland*, 23 Pick. R. 167; *Tylee v. Yates*, 3 Barb. S. C. R. 222.

³ *Wilcox v. Howland*, 23 Pick. R. 167; *Hastings v. Wiswall*, 8 Mass. R. 455; *Doe v. Warren*, 7 Greenleaf, R. 48.

⁴ *Lloyd v. Scott*, 4 Peters, R. 205.

⁵ *Buckley v. Guildbank*, Cro. Jac. 678; *Ballard v. Oddey*, 2 Mod. R. 307; *Nevison v. Whitby*, W. Jones, R. 396; *Bush v. Buckingham*, 2 Vent. R. 83; *Glassford v. Laing*, 1 Camp. R. 149; *Comyn on Usury*, sect. 2.

purely a mistake of fact, and the parties had no corrupt intention, the agreement was not usurious.¹ So, also, if a mistake be made in the calculation of interest, or indeed as to any fact connected with the contract, which gives it the appearance of usury, it may be explained, and will not vitiate the contract.² But a mistake of *law* will not save an usurious contract. And if a greater rate of interest than is legal be reserved or taken by a party to a contract, on the mistaken supposition of a legal right so to do, the contract will be void for usury.³

- § 598. If there be an agreement to take more than legal interest, it is of no consequence that no unlawful excess of interest is taken, for it is equally void whether there be an actual payment or only a promise to pay.⁴

§ 599. Again, a contract may be to be performed at the place where it is made, or elsewhere. And if the latter, it may be for a rate of interest which is illegal at the place where it is made, and legal where it is to be performed, — or the converse. And in this respect the rule as to usury is, that the law of the place where a contract is made governs its construction, unless it be to be performed in a different place, — in which case, the law of the place of performance governs.⁵ If, therefore, a contract

¹ *Buckley v. Guildbank*, Cro. Jac. 678. See also *Nevison v. Whitby*, W. Jones, 396; s. c. Cro. Cas. 501.

² *Maine Bank v. Butts*, 9 Mass. R. 49, 55; *Bank of Utica v. Smalley*, 2 Cowen, R. 770; *N. Y. Fireman's Ins. Co. v. Ely*, 2 Cowen, R. 678; *Gibson v. Stearns*, 3 N. Hamp. R. 135.

³ *Maine Bank v. Butts*, 9 Mass. 49, 55.

⁴ *Hammond v. Hoppin*, 13 Wend. R. 505; *Clark v. Badgley*, 3 Halst. R. 233.

⁵ 2 Kent, Comm. Lect. 39, p. 460; Story, Conflict of Laws, § 304, 305; *Andrews v. Pond*, 13 Peters, R. 78; *De Wolf v. Johnson*, 10 Wheat. R. 383; *Robinson v. Bland*, 2 Burr. 1077; *Van Schaick v. Edwards*, 2 Johns. Cas. 355; *Thompson v. Powles*, 2 Simons, R. 194; *Boyce v. Edwards*, 4 Peters, R. 111.

stipulate for a rate of interest, which is illegal at the place where it is made, it will be void for usury, unless its terms contemplate the performance thereof at a different place, where the rate of interest secured is legal.¹ Nor does it make any difference as to this rule, that by the terms of the agreement the debt is to be secured by a mortgage on real property in a different place,—the law of the place where it is made will govern.² If it do not manifestly appear that the contract is made with reference to the laws of another place, and in view of a performance elsewhere, the *lex loci contractus* governs; and a contract void thereby is void everywhere.³ But where a contract is to be executed in a different place from that wherein it is made, and a higher rate of interest is permitted in the place of performance, than in the place of making, the parties may stipulate for the higher interest, without rendering their contract usurious.⁴ So, also, it seems that a higher rate of interest than that allowed by either place may in some cases be secured by the contract, provided the amount above the legal interest be merely a mode of calculating the difference of exchange, or be claimed as damages for some non-performance by the debtor, and the transaction appear to be entirely *bonâ fide* and not a mere cover for usury.⁵

§ 600. We now come to the third requisite of a usurious contract, namely, — that the principal must be to be repaid at

¹ Ibid. *Andrews v. Pond*, 13 Peters, R. 78; Story, Conflict of Laws, § 304, 305.

² *De Wolf v. Johnson*, 10 Wheat. R. 383.

³ *Andrews v. Pond*, 13 Peters, R. 78.

⁴ Ibid. *Scofield v. Day*, 20 Johns. R. 102; 2 Kent, Comm. Lect. 39, p. 460, 461; *Stapleton v. Conway*, 3 Atk. R. 727; *Dewar v. Span*, 3 T. R. 425; *Depau v. Humphreys*, 20 Martin, R. 1, 30. See *Jacks v. Nichols*, 1 Selden, 178; *Davis v. Garr*, 2 Selden, 134.

⁵ *Andrews v. Pond*, 13 Peters, R. 65, 77, 78; *Chapman v. Robertson*, 6 Paige, R. 627; *Pecks v. Mayo*, 14 Verm. R. 33; Story, Conflict of Laws, § 307. See also post, § 1028 *a*, note.

all events. In all contracts, therefore, where the lender of money assumes a risk upon the loan, by which the repayment of the sum is hazarded, the contract is not usurious.¹ Thus, if money be lent on bottomry, the repayment thereof being dependent on the safe arrival of the vessel, the lender may exact more than the legal rate of interest.² So, also, the statute does not apply to contracts of insurance,³ or of guaranty, nor to wagers,⁴ the very nature of which is risk, and conditional liability. Nor does it embrace post-obit contracts, by which the lender agrees, in consideration of a sum advanced on the spot, to give the latter a larger sum on the death of some particular person, from whom the borrower has expectations, if he survive such person; for although such contracts may be relieved against in equity as being *unconscionable*, when they are extortionate,⁵ yet they have never been considered as usurious, because of the hazard which attaches to them.⁶ So, also, the purchase of an annuity for life or lives, if made *bonâ fide*, and not as a mere cloak for usury, does not come within the regulations of the statute.⁷ Yet if the mere form of purchasing an annuity be assumed in order to evade the statute of usury, and the contract be virtually a loan, and not a sale, it will be treated as usurious.⁸ The question is

¹ Ex parte Wilson, 2 Jur. 98.

² Sharpley v. Hurrell, Cro. Jac. 208; Sayer v. Glean, 1 Lev. R. 54; Long v. Wharton, 3 Kib. R. 304; Thorndike v. Stone, 11 Pick. R. 183.

³ Joy v. Kent, Hard. R. 418; Chesterfield v. Janssen, 1 Wils. R. 286; s. c. 1 Atk. R. 347.

⁴ Button v. Downham, Cro. Eliz. 643; Lamago v. Gould, 2 Burr. R. 715.

⁵ Story, Eq. Jur. 342; Lushington v. Waller, 1 H. Black. R. 94; Chesterfield v. Janssen, 1 Atk. R. 347; Mathews v. Lewis, 1 Anstr. R. 7; Wharton v. May, 5 Ves. jr. R. 27; Boynton v. Hubbard, 7 Mass. R. 119.

⁶ Lushington v. Waller, 1 H. Black. R. 94; Chesterfield v. Janssen, 1 Atk. R. 347; Batty v. Lloyd, 1 Vern. R. 141.

⁷ Scott v. Lloyd, 9 Peters, R. 449; Lawley v. Hooper, 3 Atk. R. 278; Comyn on Usury, sect. v. and cases cited; Chesterfield v. Janssen, 1 Atk. R. 347; s. c. 1 Wils. R. 295.

⁸ Ibid. Scott v. Lloyd, 9 Peters, R. 449; Marsh v. Martindale, 3 Bos. &

solely, what is the substance of the transaction, and the true intent of the parties; for if the contract be intended as a sale, it is good; if it be intended as a loan, it is bad; and this question is for the determination of the jury upon the peculiar circumstances of the case.¹ The mere fact, however, that a loan of money was talked about and meditated beforehand, although it affords ground for suspicion, will not of itself render a contract usurious.²

§ 601. The rule, therefore, is, that no contract is usurious, unless it be a loan for more than legal interest, of the repayment of which there is no hazard taken, except that which is necessary and incidental to a loan. The mere common risk of repayment of a loan is not sufficient hazard to take it out of the statute. If, however, the transaction be a formal evasion of the statute, and, although it avoid the form of a loan, be, nevertheless, essentially a contract of borrowing and lending, it will be usurious, if more than legal interest be received thereby. And where a contract is not on the face of it usurious, it is always a question for the jury to determine, whether it is a mere device to evade the statute, or is a *bonâ fide* transaction, to which the statute does not apply,³ — the intention of the parties being the test of the legality of a contract.

§ 602. In the next place, as to some general considerations. Where a contract is usurious in its origin, that is, where, by its original terms, it contemplates the taking of more than legal

Pul. 153; *Drew v. Power*, 1 Sch. & Lefr. 182; *Richards v. Brown*, Cowp. R. 776; *Lloyd v. Scott*, 4 Peters, R. 205.

¹ *Ibid.* *Richards v. Brown*, Cowp. R. 776.

² *Train v. Collins*, 2 Pick. R. 145; *Murray v. Harding*, 3 Wils. R. 390; s. c. 2 Black. R. 859; *Scott v. Lloyd*, 9 Peters, R. 449; *Chesterfield v. Janssen*, 1 Atk. R. 347.

³ *Bank of U. S. v. Waggener*, 9 Peters, R. 400; *Scott v. Lloyd*, 9 Peters, R. 445; *Andrews v. Pond*, 13 Peters, R. 65; *Stevens v. Davis*, 3 Metcalf, R. 211; *Thomas v. Catherall*, 5 Gill & Johns. 23.

interest, it is utterly void. So strict is this rule, that even a *bonâ fide* holder of negotiable paper for a valuable consideration without notice cannot recover thereon, if such paper were originally usurious.¹ Nor does it matter that more than legal interest is not in fact exacted, for if the contract provide for the payment of an illegal rate of interest, and there be no mere mistakes of fact, it is void, whether such illegal interest be exacted or not.² Every contract which is usurious in its origin is absolutely void, and no subsequent act of the parties can make it valid.

§ 603. So, also, if a new security be taken, or a new contract be made to pay a debt, or perform a contract which is usurious in its origin, as between the original parties, or as between any parties who are cognizant of the usurious nature of the original contract, such new security or contract is void.³ But where a usurious bond or note comes to the hand of a *bonâ fide* holder, without knowledge of the usury, if a new contract be made, securing to him the full payment of such bond or note, it will be valid.⁴ Again, if a usurious contract be originally made, and the parties thereto agree to substitute

¹ Ackland v. Pearce, 2 Camp. R. 599; Lowe v. Waller, Doug. R. 736; Young v. Wright, 1 Camp. R. 141; Sauerwein v. Brunner, 1 Harr. & Gill, 477; Powell v. Waters, 8 Cowen, R. 669; Bank of U. S. v. Waggener, 9 Peters, R. 399.

² Clark v. Badgley, 3 Halst. R. 233; Brown v. Fulsbyes, 4 Leon. R. 43; Shep. Touch. 63; Body v. Tassell, 3 Leon. R. 205; 1 Mod. R. 69; Roberts v. Trenayne, Cro. Jac. 507; Hammond v. Hoppin, 13 Wend. R. 505.

³ Bridge v. Hubbard, 15 Mass. R. 96; Cuthbert v. Haley, 3 Esp. R. 22; 8 T. R. 390; Bank of the U. S. v. Waggener, 9 Peters, R. 399; Reed v. Smith, 9 Cowen, R. 647; Powell v. Waters, 8 Cowen, R. 669; Wickes v. Gogerly, 1 Car. & Payne, 396; Hargreaves v. Hutchinson, 2 Adolph. & Ell. 12; Brigham v. Marean, 7 Pick. R. 40; Moncure v. Dermott, 13 Peters, R. 345; Chapman v. Black, 2 Barn. & Ald. 588; Walker v. Bank of Washington, 3 How. U. S. 62.

⁴ Moncure v. Dermott, 13 Peters, R. 345; Kent v. Walton, 7 Wend. R. 256; Cuthbert v. Haley, 8 T. R. 390.

therefor a new contract which is not usurious, such new contract will be valid.¹

§ 604. But where a contract is valid, and not usurious in its inception, any subsequent taking of more than legal interest will not render the original contract void, but only subject the party paying it to the penalty prescribed in the statute; that is, the usury attaches in such cases to the person, and not to the contract.² So, also, if a new usurious contract be made to pay illegal interest on a contract or bond, which was valid in its inception, the latter contract does not vitiate the former.³ If, therefore, one man, being already legally indebted to another, promise to forbear exacting such debt, on condition that the latter shall pay usurious interest on it, such subsequent contract is void, but it does not prevent the party from recovering the original valid debt.⁴ And if a note or security of any kind be originally given for a legal consideration, it cannot afterwards be rendered usurious in itself by any usurious sale or discount thereof, but the usury only attaches to the new contract or promise.⁵

§ 605. But although the mere fact, that a contract contemplates the taking of more than legal interest originally, makes it void, yet it does not subject the party contracting for it to

¹ *Barnes v. Hedley*, 2 Taunt. R. 184; *Wright v. Wheeler*, Peake, Ad. Cas. 175; s. c. 1 Camp. R. 165, note; *Kilbourn v. Bradley*, 3 Day, R. 356; *Botsford v. Sanford*, 2 Conn. R. 276.

² *Bank of U. S. v. Waggener*, 9 Peters, R. 399; *Floyer v. Edwards*, Cowp. R. 112; *Cram v. Hendricks*, 7 Wend. R. 569; *Braman v. Hess*, 13 Johns. R. 52; *French v. Grindle*, 15 Maine R. 163; *Gardner v. Flagg*, 8 Mass. R. 101; *Thompson v. Woodbridge*, 8 Mass. R. 256; *Chadbourn v. Watts*, 10 Mass. R. 121; *Pollard v. Scholy*, Cro. Eliz. 20; *Gray v. Fowler*, 1 II. Black. R. 462.

³ *Ibid.* Chitty on Cont. p. 612 a, note.

⁴ *Ramsdell v. Soule*, 12 Pick. R. 126; *Pollard v. Scholy*, Cro. Eliz. 20; *Bank of U. S. v. Waggener*, 9 Peters, R. 400.

⁵ *Ibid.*

the penalty of the statute, unless it be actually taken.¹ The penalty is incurred only by the actual reception of interest, and if it be actually taken, it matters not whether the contract were or were not usurious in its origin,² the legality or illegality of the original contract affording no criterion of the liability of the parties to the penalty, and the only question being, whether an illegal rate of interest has actually been recovered.

§ 606. In the next place, as to the effect of an usurious contract upon the remedies of the parties. The *general* rule is, that where parties have made an illegal contract, knowing it to be so, no relief will usually be granted to them, either in law or in equity;³ but they will be left in whatever condition the contract places them, the maxim being, *In pari delicto potior est conditio defendentis*. There are, however, some exceptions to this rule, and among them contracts for usury are admitted as an exception, on the ground of public policy.⁴ Al-

¹ Fisher v. Beasley, 1 Doug. R. 237; Lloyd v. Williams, 3 Wilson, R. 261; Commonwealth v. Frost, 5 Mass. R. 53; Simpson v. Warren, 15 Mass. R. 460; Maddock v. Hammett, 7 T. R. 184; Pearson v. McGowran, 3 Barn. & Cres. 700.

² Ibid. Metcalf v. Brown, Holt, N. P. R. 295; Bank of U. S. v. Waggener, 9 Peters, R. 400.

³ 1 Story, Eq. Jurisp. § 298; Tompkins v. Bernet, 1 Salk. R. 22; Smith v. Bromley, Doug. R. 697; Collins v. Blantern, 2 Wils. R. 347; Inhab. of Worcester v. Eaton, 11 Mass. R. 368; McCullum v. Gourlay, 8 Johns. R. 147; Neville v. Wilkinson, 1 Bro. Ch. R. 543; Watts v. Brooks, 3 Ves. jr. R. 612; Osborne v. Williams, 18 Ves. R. 379; St. John v. St. John, 11 Ves. R. 535; Howson v. Hancock, 8 T. R. 575.

⁴ Smith v. Bromley, Doug. R. 695, note. In this case Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for, where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover; and it is astonishing that the Reports do not distinguish between the violation of the one sort and the other."

though, therefore, an usurious contract for the payment of illegal interest is void, so that the lender not only cannot enforce it either at law or in equity against the borrower, but is subject to the penalty prescribed in the statute if he take illegal interest; yet the borrower cannot avail himself of the defence of usury, nor can he reclaim the illegal interest already paid, unless he actually pay, or offer to pay to the lender all that is *bonâ fide* due to him; that is, the principal actually lent, with the legal interest thereon.¹ For although the borrower will be protected against usury, he will not be allowed to avail himself thereof for the purpose of taking advantage of the lender, and defrauding him of money actually advanced; the maxim being, that he who seeks equity, must do equity.²

§ 607. If, however, the borrower offer to repay the principal borrowed, together with legal interest thereon, he may avail himself of usury as a defence to an action on a contract to pay more than legal interest.³ So, also, if he have already paid the money on such an usurious contract, he may reclaim the excess paid above the principal and legal interest, and no more;⁴ the necessity of his wants, and the duress of circumstances affording the reason for not applying to him the general rule applicable to a *particeps criminis*, namely, — that the law will leave him where it finds him. The exceptional rule in these respects is the same, both in law and in equity, usury

Astley v. Reynolds, 2 Strange, R. 915; *Browning v. Morris*, Cowp. R. 790; *Clarke v. Shee*, Cowp. R. 200.

¹ *Fanning v. Dunham*, 5 Johns. Ch. R. 142; *Fitzroy v. Gwillim*, 1 T. R. 153; *Hindle v. O'Brien*, 1 Taunt. R. 413; *Astley v. Reynolds*, 2 Strange, R. 915; *Clarke v. Shee*, Cowp. R. 200; *Mason v. Gardner*, 4 Bro. Ch. R. 436; *Rogers v. Rathbun*, 1 Johns. Ch. R. 367.

² *Ibid.* *Scott v. Nesbitt*, 2 Bro. Ch. R. 649; 1 Story, Eq. Jurisp. § 301; *Ex parte Skip*, 2 Ves. R. 489; *Benfield v. Solomons*, 9 Ves. R. 84.

³ See cases cited *supra*.

⁴ 1 Story, Eq. Jurisp. § 302; *Smith v. Bromley*, Doug. R. 696, note; *Browning v. Morris*, Cowp. R. 792; *Bond v. Hays' Ex'rs*, 12 Mass. R. 34; *Bosanquet v. Dashwood*, Cas. Temp. Talb. 41; *Pitt v. Cholmondeley*, 2 Ves. sen. 567.

being permitted to him with the same limitation in both forums, as either a defence, or a ground of relief. Where goods have been advanced for the borrower to raise money upon, he would only be bound to offer to pay to the lender the actual price received thereon, and interest, and not the value of the goods; for as money and not goods is the object of such a contract, the borrower is only bound to repay the money actually produced by the goods.¹

§ 607 *a*. The right to avoid a contract for usury adheres only to the parties, and a stranger cannot avail himself of usury as a defence. Thus, a subsequent mortgagee cannot take advantage of usury in a prior mortgagee.² But where a person is indirectly connected with the contract, as if he be a guarantor thereon, he is so far a party as to entitle him to the defence of usury.³

¹ *Barker v. Vansommer*, 1 Bro. Ch. R. 151.

² *Mechanics Bank v. Edwards*, 1 Barb. R. 271; *Stoney v. American Life Ins. Co.*, 11 Paige, R. 635.

³ *Huntress v. Patten*, 20 Maine R. 28. The following table taken from the *Bankers Magazine* for January, 1855, contains a condensed statement of the laws of the several States of this country in relation to usury and interest.

<i>Legal rate of Interest.</i>	<i>per cent.</i>	<i>Penalty for Violation of Usury Laws.</i>
Maine,	6	Excess not recoverable.
New Hampshire,	6	Forfeit three time the interest.
Vermont,	6	Excess may be recovered back.
Massachusetts,	6	Forfeit three times the whole interest.
Rhode Island,	6	Excess may be recovered by payer.
Connecticut,	6	Forfeiture of all the interest.
New York,	7	Forfeiture of contract.
New Jersey,	6	Forfeiture of contract.
Pennsylvania,	6	Forfeiture of contract.
Delaware,	6	Forfeiture of contract.
Maryland,	6	Excess recoverable by payer.
Virginia,	6	Contract void.
North Carolina,	6	Contract void.
South Carolina,	7	Forfeiture of all the interest.
Georgia,	7	Forfeiture of all the interest.
Alabama,	8	Forfeiture of all the interest.
Arkansas,	6	Contract void.
Florida,	6	Forfeiture of all the interest.

TRADING WITH AN ENEMY WITHOUT LICENSE.

§ 608. Every contract made with an enemy, with knowledge that he is so, is void, unless it be made with the special permission of the government.¹ Thus, a policy of insurance upon the property of an enemy is void.² And the same rule applies to the case of bills of exchange, promissory notes, and all other contracts, made with the subject of an enemy's country. This rule is said to obtain upon the ground that the re-

<i>Legal rate of Interest.</i>	<i>per cent.</i>	<i>Penalty for Violation of Usury Laws.</i>
Illinois,	6	Defendant recovers his cost.
Indiana,	6	Fine of five times the whole interest.
Iowa,	6	Forfeiture of excess of interest.
Kentucky,	6	Contract for interest void.
Louisiana,	5	Forfeiture of all the interest.
Michigan,	7	No penalty.
Mississippi,	6	Forfeiture of excess of interest.
Missouri,	6	Forfeiture of excess of interest.
Ohio,	6	Forfeiture of excess of interest.
Tennessee,	6	Liable to indictment for misdemeanor.
Texas,	8	Forfeiture of all the interest.
Wisconsin,	8	Special contracts, 12 per cent.
California,	10	No penalty.

There are various States that permit a higher rate of interest on special contracts, namely:—In Vermont, 7 per cent. may be charged upon railway bonds; in New Jersey, 7 per cent. may be charged in Jersey City and the township of Hoboken; in Maryland, the penalty is a matter of some doubt, in consequence of a late decision of Judge Taney, which does not, however, meet the assent of the bar of Baltimore; in Arkansas, 10 per cent. may be charged on special contracts; in Illinois, the banks may charge 7 per cent., and 10 per cent. may be charged between individuals on special contracts; in Iowa, 10 per cent. is allowed on special contracts; in Louisiana, 8 per cent. may be so charged; in Michigan, contracts in writing are legal to charge 10 per cent.; the same in Mississippi and Ohio; in Texas, 12 per cent. may be charged on special contracts.

¹ See *Griswold v. Waddington*, 15 Johns. R. 57; s. c. 16 Johns. R. 438, in which the whole doctrine respecting the illegality of commercial intercourse between belligerents is thoroughly discussed, and the cases examined. 1 Kent, Comm. Lect. 3, p. 68; *Scholefield v. Eichelberger*, 7 Peters, N. S. R. 586; S. P. Story on Bills of Exchange, § 99 to § 105.

² Phillips on Insurance, subsec. 147, 223, 237 et seq. and cases cited.

sources of the enemy may be thereby increased and his wants supplied.¹ But this prohibition cuts both ways; for the resources of the other party may be equally increased, and his wants equally relieved. The true reason seems to be, that the two parties are at war, and it is the policy of war for each party to injure the other party to its utmost ability, even though such injury may be recoiling continually. Besides, no two countries can be at war while the citizens thereof are at peace, for the very objects of war might be thereby frustrated.

§ 609. So, also, all commercial partnerships existing between citizens of the two countries, are dissolved by war, so that no new contract can arise between them, pending such war.² This rule was even carried so far, as to prohibit a remittance of supplies to a British colony, during its temporary subjection to the enemy, although the supplies were but partially and imperfectly made by the enemy, and when they were absolutely necessary.³ Nor can an ally engage in trade with a common enemy, without rendering himself liable to the penalty of seizure and forfeiture of property, so engaged.⁴ If, however, a plaintiff be deceived by the defendant, and trade with him, not knowing him to be an enemy, he may, after the return of peace, maintain an action upon such a contract.

§ 610. During war, all right of action is suspended between belligerents, unless the alien enemy be under the protection of the government; as, where he comes into the country by license during war; or being there at the time of the war, is permitted to continue. Thus, where, during a war between England and America, an American vessel, pretending to be a neutral, went into Bermudas, and in the character of a neu-

¹ *Willison v. Patteson*, 7 Taunt. 447, and cases cited in American ed.

² *Griswold v. Waddington*, 15 Johns. 57; s. c. 16 Johns. 438; *Seaman v. Waddington*, 16 Johns. 483, 510.

³ *La Bella Giudita*, cited in *The Hoop*, 1 Rob. Adm. 207.

⁴ *The Nayade*, 4 Rob. 251; *The Neptunus*, 6 Rob. R. 403.

tral obtained credit for repairs; it was held, that the owners of the vessel were answerable, on the restoration of peace, to the British merchants who aided them to repair; upon the ground that the plaintiffs were ignorant of the national character of the vessel, and dealt upon the faith, that they were dealing with a neutral.¹

§ 611. A license, however, from the government, legalizes the contracts of its subjects with foreign enemies, so that they may be enforced in the courts of the licensing government, and the party be protected from prize law.² If, however, the license be limited, and its limitations be transgressed, it will legalize any contract, or portion of a contract, within its terms. Thus, where the license only extended to the importation of certain specific articles from the enemy's port, and others were taken on board, not included in the license; it was held, that the license protected the articles within its terms.³

§ 612. The only exception, that obtains to this strict rule, is the case of ransom bills, which are contracts of necessity.⁴ But a ransom bill cannot be put in suit on the part of the alien enemy in the courts of the other belligerent. And in England, where such contracts were formerly legal, proceedings were always carried on in the name of the hostage suing for his liberty.⁵ A bill of exchange drawn or negotiated in

¹ See ante, Alien, § 54; *Crawford v. The Wm. Penn, Peters*, C. C. R. 105; *Musson v. Fales*, 16 Mass. 332. See *Coolidge v. Inglee*, 13 Mass. 46.

² *Patton v. Nicholson*, 3 Wheat. 207, note; *Crawford v. The Wm. Penn, Peters*, C. C. R. 106.

³ *Butler v. Allnut*, 1 Stark. R. 222; *Keir v. Andrade*, 6 Taunt. R. 498; *Camelo v. Britten*, 4 Barn. & Ald. 184; *Clark v. Protection Ins. Co.* 1 Story, R. 128.

⁴ 1 Kent, Comm. 68; *Maissonaire v. Keating*, 2 Gall. R. 336.

⁵ *The Rebecca*, 5 Robinson, 102; *Maissonaire v. Keating*, 2 Gallis. R. 325, 337, 341; *Story on Bills of Exchange*, § 101. The statute of George III. c. 25, forbids contracts for ransoming captured property, and renders them void in England.

favor of any person competent to sue, would, however, be binding, if it were given for a ransom of a captured ship, unless it were prohibited by some statute.¹ So, also, a bill, drawn by a prisoner of war upon a fellow-subject resident in his own country, will be valid, whether it were made payable to an alien enemy, or indorsed to him, if it be for the purpose of obtaining necessities and subsistence for the prisoner.² So, also, in cases of cartel ships, where bills are drawn and negotiated in the enemy's country, for purposes connected with the objects of the voyage, such as for necessary repairs, provisions, and other supplies, they are valid.³

¹ *Cornu v. Blackburne*, 2 Doug. 641; *Antbon v. Fisher*, 2 Doug. 649, note; *Yates v. Hall*, 1 T. R. 73; *Maissonaire v. Keating*, 2 Gallis. R. 324, 337, 341; *Ricord v. Bettenham*, 3 Burr. 1734; *Brandon v. Nesbitt*, 6 T. R. 23; *Story on Bills of Exchange*, § 101; *Puffendorf de jure nat. et Gent. Lib. 8, cap. 7, § 14*, and *Barbeyrac's note*; *Vattel*, B. 3, ch. 16, § 414.

² *Antoine v. Morshead*, 6 Taunt. 237; *Daubuz v. Morshead*, 6 Taunt. 332; *Duhammel v. Pickering*, 2 Stark. 90; *Bayley on Bills*, ch. 2, § 9, p. 75, 76.

³ *Potts v. Bell*, 8 T. R. 548. See, also, *Houriet v. Morris*, 3 Camp. 303; *The Hoffnung*, 2 Rob. R. 162; *The Cosmopolite*, 4 Rob. R. 8; *The Clio*, 6 Rob. R. 67; *Story on Bills of Exchange*, 102, 103.

CHAPTER XX.

CONTRACTS IN VIOLATION OF A STATUTE.

§ 613. WE now come to the consideration of *Contracts in Violation of a Statute*; and the rule, in regard to such contracts, is, that they are utterly void; whether the consideration of the agreement, or the act to be performed, be in violation of a statute.¹

§ 614. A statute may either *expressly* prohibit or enjoin an act, or it may *impliedly* prohibit or enjoin it, by affixing a penalty to the performance or omission thereof. Nor does it make any difference, whether the prohibition be express or implied; in either case a contract in violation of its provisions is void.² It was, however, formerly held, that, if a statute only annexed a penalty to the performance of certain

¹ *Bartlett v. Vinor*, Carth. 252; *Holman v. Johnson*, Cowp. 343; *Mouys v. Leake*, 8 T. R. 411; *Kerrison v. Cole*, 8 East, 231; *Doe v. Pitcher*, 6 Taunt. 359; *Greenwood v. Bishop of London*, 5 Taunt. 727; *S. P. Newman v. Newman*, 4 Maule & Selw. 66; *Wigg v. Shuttleworth*, 13 East, 87; *Ribbans v. Crickett*, 1 Bos. & Pul. 264; *Gallini v. Laborie*, 5 T. R. 242; *Law v. Hodson*, 11 East, 300; *Fales v. Mayberry*, 2 Gall. 560; *Hunt v. Knickerbacker*, 5 Johns. R. 327; and *Wheeler v. Russell*, 17 Mass. 258, where all the cases are collected and discussed.

² *De Begnis v. Armistead*, 10 Bing. R. 107; *Fergusson v. Norman*, 5 Bing. N. C. R. 80; *Wetherel v. Jones*, 3 Barn. & Adolph. 221; *Pellecat v. Angell*, 2 Crompt. Mees. & Roscoe, 311; *Bell v. Quin*, 2 Sandf. S. C. R. 146; *Barton v. Port Jackson Plank Road*, 17 Barbour, 404.

acts or contracts, without expressly prohibiting them, the penalty was to be considered, not as punishment or prohibition, but only as a tax, which would not invalidate the act or contract, but only subject the party infringing the provision of the statute to the payment of the penalty.¹ Thus, under the statute of 27 Henry VI. which imposes a penalty for selling property at a fair on Sunday, a sale made on that day was held to be binding, although the seller was liable to pay the penalty.² But this doctrine has long since been exploded; and is now well settled, that a penalty implies a prohibition, though there be no prohibitory words in the statute; and that an agreement in violation of a statute, prohibiting or enjoining an act absolutely, or only under a penalty, cannot be enforced.³

§ 615. Thus, it was held, that an action would not lie for breach of an agreement to dance at a certain theatre, it not being licensed, according to the provision of the statute of 10 George II.⁴ So, also, a note given for shingles, not surveyed, and not of the dimensions required by the statute for-

¹ *Comyns v. Boyer*, Cro. Eliz. 485; *Gremaire v. Valon*, 2 Camp. 144; 1 Black. Comm. 58. See ante, § 160; *Ex parte Dyster*, 2 Rose; Bank. Cases, 359; *Johnson v. Hudson*, 11 East, 180.

² *Comyns v. Boyer*, Cro. Eliz. 485. See also, *Ex parte Dyster*, 2 Rose, Bank. Cas. 349; *Gremaire v. Valon*, 2 Camp. R. 144.

³ Ante, § 162; *Drury v. Defontaine*, 1 Taunt. 136; in which Lord Mansfield said: "If any act is forbidden under a penalty, a contract to do it is now held void. That case [*Comyns v. Boyer*, Cro. Eliz. 485] is not now law." *Bartlett v. Vinor*, Carth. 252; *Skinner*, 322; *De Begnis v. Armistead*, 10 Bing. 110; *Bensley v. Bignold*, 5 Barn. & Ald. 335; *Nichols v. Ruggles*, 3 Day, 145; *Tyson v. Thomas*, 1 McLell. & Younge, 119; *S. P. Forster v. Taylor*, 5 Barn. & Ad. 887; *Little v. Poole*, 9 Barn. & Cres. 192; *Fennel v. Ridler*, 5 B. & C. 406; s. c. 8 Dowl. & Ry. 204; *Smith v. Sparrow*, 4 Bing. 84; *Kepner v. Keefer*, 6 Watts, 231; *Clarke v. Protection Ins. Co.* 1 Story, 119; *Wheeler v. Russell*, 17 Mass. R. 258; *Pattee v. Greeley*, Am. Law Reporter, (N. S.) vol. 1, No. 6, p. 245, (Sup. Jud. Court of Mass.); *Bell v. Quin*, 2 Sandf. S. C. R. 146.

⁴ *Gallini v. Laborie*, 5 T. R. 242; *King v. Handy*, 6 T. R. 286.

bidding the sale, is void.¹ So, also, a contract is void, for the same reason, if made for lottery tickets;² or for bank-notes, the sale or circulation of which is prohibited, under a penalty;³ or for the sale of spirituous liquors contrary to law,⁴ or for an insurance on naval stores, exported against an order in council;⁵ or for the proceeds of a voyage in the slave-trade;⁶ or for the sale of a title to lands, previously adjudged to be illegal;⁷ or for insurance on a voyage, really intended in violation of the non-intercourse acts.⁸

§ 616. So, also, all contracts made in violation of the statute forbidding persons from exercising any "worldly labor, business, or work of their ordinary (or secular) callings, upon the Lord's day, or any part thereof, (works of necessity or charity alone excepted,)" come under the general rule, and are void. Nor does it matter as to the validity of a contract made on Sunday, whether it be made privately or publicly.⁹ Thus, where a horse was sold on Sunday, upon a warranty, the warranty was held to be void.¹⁰ If the statute declares the con-

¹ *Wheeler v. Russell*, 17 Mass. 258; *S. P. Law v. Hodson*, 2 Camp. 147; s. c. 11 East, 300; *Forster v. Taylor*, 5 B. & Ad. 889. See also *Springfield Bank v. Merrick*, 14 Mass. 322.

² *Hunt v. Knickerbacker*, 5 Johns. R. 327.

³ *Springfield Bank v. Merrick*, 14 Mass. 322.

⁴ *Perkins v. Cummings*, 2 Gray, R. 258.

⁵ *Parkin v. Dick*, 11 East, 502.

⁶ *Fales v. Mayberry*, 2 Gall. 560.

⁷ *Mitchell v. Smith*, 1 Binn. 110.

⁸ *Russell v. Degrand*, 15 Mass. 35. See also *Ribbans v. Crickett*, 1 Bos. & Pul. 264; *Camden v. Anderson*, 6 T. R. 723; 1 Phillips on Ins. ch. 3, § 2; 1 Comm. on Cont. 39, 46, 1st ed.

⁹ *Fennell v. Ridler*, 5 Barn. & Cres. 406; *State v. Suhur*, 33 Maine R. 539. But see *Boynton v. Page*, 13 Wend. R. 425.

¹⁰ The statutes of Rhode Island and South Carolina follow the statute of 29 Charles II. c. 7, s. i. as set forth in the text. In the statute of New Hampshire the words are "of his secular calling to the disturbance of others," and there is also a prohibition to "use any play, game, or recreation on that day or any part thereof." But the statutes of Maine, Vermont, Massachusetts,

tract void, only in case it be made before sunset on Sunday, it must appear affirmatively that it was so made.¹

Connecticut, and Pennsylvania interdict *every kind* of secular labor on Sunday, whether in one's *ordinary calling* or not. The courts of these States have, with the exception of Massachusetts, pronounced all contracts made in violation of this statute, to be void. *Fox v. Abel*, 2 Conn. R. 560; *Lyon v. Strong*, 6 Verm. R. 219; *Adams v. Gay*, 19 Verm. R. 358; *Clough v. Davis*, 9 N. Hamp. R. 500; *Varney v. French*, Sup. Ct. of New Hamp. 1848; 7 Am. Law Rep. (N. S.) 592; *Kepner v. Keefer*, 6 Watts, (Penn.) R. 231; *Burrill v. Smith*, 2 Miles, (Penn.) R. 402; *Fox v. Mensch*, 3 Watts & Serg. (Penn.) R. 444. The New York statute refers only to "servile labor" and "exposing goods for sale." But the judicial opinions in Massachusetts seem to indicate a broader doctrine; and although there is no express decision, which contradicts the general doctrine, there are some dicta which point that way. In the case of *Geer v. Putnam*, 10 Mass. 317, which was assumpsit on a promissory note, the defendant pleaded in bar, that it was made on Sunday; to which the plaintiff replied by a general demurrer. Judgment being rendered for the plaintiff in the common pleas, the defendant brought a writ of error in the supreme court, where his counsel abandoned the point, and the judgment was affirmed. But the general question was not considered by the court at all, it not being necessary; for the *plea* was clearly bad, on general demurrer, for not alleging either that the note was made within that part of the Lord's day, on which secular business is prohibited, or was not within the exception, in respect to works of necessity or charity. The judgment, therefore, was right, upon the defective state of the pleadings. In *Clap v. Smith*, 16 Pick. 247, the authority of *Geer v. Putnam* was recognized, and the opinion of the court was founded thereupon; in this case, it was said, by Wilde, J., that the case of *Geer v. Putnam*, having been so long before the public, and no attempt having been made in the legislature to change the exposition of this law, the statute might be considered as expounded by public opinion, and, therefore, as not prohibiting the making of contracts on that day. This, however, was extrajudicial; for, in the case at bar, the question was, whether an assignment in general terms, referring to a schedule annexed, which was executed on Saturday, but the assignment not being annexed until Sunday, was valid. Here, also, it did not appear on what part of the day the schedule was annexed; but the court held, that if the assignment were *void*, yet the plaintiff's title was good, as supported by verbal proof of a delivery to him, in trust.

Since the above note was written, the courts of Massachusetts have distinctly

¹ *Nason v. Dinsmore*, 34 Maine R. 390.

§ 617. The statute, it will be observed, only prohibits the exercise of business or work of the *ordinary calling* of the

declared the doctrine which elsewhere obtains, that all contracts made on Sunday, being in violation of a statute prohibiting "the doing of any labor, business, or work, except only works of charity and necessity," are void. In *Robeson v. French*, 12 Metcalf, R. 24, it was decided that an action cannot be maintained for a deceit practised in the exchange of horses on Sunday, and in *Pattee v. Greeley*, 1 Law Reporter, (N. S.) No. 6, (October, 1848,) p. 245, it was held, that a bond made on Sunday was void. So, also, as the Revised Statutes of Massachusetts provide that "no person shall travel on the Lord's day, except from necessity or charity," under penalty of ten dollars for every offence, it was held, in *Bosworth v. The Inhabitants of Swansey*, 10 Metcalf, R. 363, that a person travelling on Sunday, neither from necessity nor charity, cannot maintain an action against a town for an injury received by him, by reason of a defect in a highway, which the town is by law obliged to repair. These cases harmonize the Massachusetts decisions with those in the other States of America and with the English decisions. Some doubt may fairly arise as to whether a "contract" can justly come under the denomination of "labor, business, or work," particularly where it is by parol; and as the statute is penal, and should therefore be construed strictly, a narrow interpretation, excluding contracts from the rule, would, in view of the previous decisions, seem at least to have been open to the court. At all events, it may well be questioned, whether the statute of Massachusetts, the offspring of a bigoted and narrow-minded Puritanism, ought not to be repealed, not only as being behind the spirit of the age, averse to its customs, opinions, and morals, but as being productive in many cases of direct injury, and affording opportunities of fraud and deceit of innocent and ignorant persons. It is difficult to perceive, if the doctrine held in these cases is correct, how a marriage, the legal obligations of which are founded in contract, can be valid, if celebrated on Sunday. If they be void, it necessarily follows that the parties are guilty of illegal cohabitation, and the children are bastards, and incapable of inheritance. And as marriages on Sunday are among the commonest of practices, the application of this doctrine might work immeasurable evils, not only as to future contracts of marriage, but as to those of the past. A marriage cannot certainly be excepted on the ground that it is a work of necessity or of charity; and if public policy be allowed as a reason to exclude marriages from the effect of this statute, why should not other contracts, just and proper in themselves, and the denial of which may be productive of wrong to innocent parties, be also admitted?

The following remarks on the more liberal statute, which governs contracts made on Sunday in England, may well be considered here. They are from

party. The validity of any contract made on Sunday will, therefore, depend upon whether or not it relates to the ordinary calling of the person making it;¹ and it becomes necessary to consider what is intended by this phrase. The "ordinary calling," then, of a man, is understood to embrace all contracts which peculiarly belong to his profession, business, or trade, in which he is engaged, and does not extend to ordinary acts done by him, which do not specially relate thereto, although they be incidental and collateral. Thus, the hiring of a laborer by a farmer, though it be incidental to farming, does not peculiarly belong thereto, and has been held not to be within the statute.² But an agreement made by an attorney on

a very clever little treatise on the Law of Contracts for Works and Services, by David Gibbons, Esq. "This partial enactment of the Fourth Commandment, sanctioned by a 5s. penalty, appears rather ridiculous, if it is not worse. It may be doubted whether man's duty towards God is a proper subject for human laws. It is not in the power of an act of parliament to make a man pass his Sabbath religiously; and if he is unwilling to do so, he may as well work in his ordinary calling as do any thing else.

"The object of the Divine Law, if we may presume to offer a conjecture on such a subject, is to enable a man to show to his fellows his faith in and love to God. Obedience to such a law must be the offspring of freewill. Human laws apply only to the unwilling. A human law prohibiting the same act which the Divine law prohibits, does not tend to assist or enforce the Divine law, but the contrary. It in appearance confounds the religious and the irreligious, by preventing the irreligious from doing what they are willing to do, thereby making them appear to be religious when they are not really so. A Divine law can only be enforced by persuasion; and it is the duty of the religious part of the community, or those appointed for that purpose, to persuade the irreligious to obedience. The tendency of a law which in appearance confounds the two classes, is to conceal from the one class the extent of the duty they have to perform, and to weaken their efforts; it resembles the surface-healing of a wound, which delays the cure." See a discussion of this question in *Massachusetts Quarterly Review*, Vol. III. Art. IV. p. 67, (Dec. 1849).

¹ *Rex v. The Inhab. of Whitnash*, 7 Barn. & Cres. 602; s. c. 1 Mann. & Ryl. 452; *Drury v. Defontaine*, 1 Taunt. R. 131; *Bloxsome v. Williams*, 3 Barn. & Cres. 233.

² *Rex v. The Inhab. of Whitnash*, 7 Barn. & Cres. 596. In this case, Mr. Justice Bayley said: "The true construction of the words 'ordinary calling,'

Sunday, binding him personally to the settlement of his client's affairs, has been held not to be good.¹ And a contract to publish an advertisement in a paper issued on Sunday, is void, and compensation cannot be recovered.²

§ 618. Yet if either party make the contract *bonâ fide*, and without knowledge that the other is exercising his ordinary calling in making it, he may avail himself of the contract, because he is not knowingly involved in the illegality; but the other party cannot enforce the contract, or plead its illegality in defence.³

§ 619. But a contract for the sale of goods will not be void under the statute, unless it be made legally complete on Sunday.⁴ If it be a mere bargaining, without a definite agreement, — or if it do not comply with the requisitions of the Statute of Frauds, so as to be legally binding, it will be valid. Thus, where a horse was bought by parol on Sunday, but was not delivered until Monday, it was held to be a valid sale, because the sale was not made binding on Sunday under the Statute of Frauds.⁵ Yet if the contract be virtually settled

seems to me to be, not that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily or weekly in the course of trade or business are parts of the *ordinary calling* of a man exercising such trade or business, but the hiring of a servant once in the year does not come within the meaning of those words." *Sandiman v. Breach*, 7 Barn. & Cres. 96.

¹ *Peate v. Dicken*, 1 Crompt. Mees. & Rosc. 422; s. c. 5 Tyrw. 116. See also *Scarfe v. Morgan*, 4 Mees. & Welsb. 270.

² *Smith v. Wilcox*, 19 Barb. R. 581.

³ *Ibid.* *Bloxsome v. Williams*, 3 Barn. & Cres. 232; s. c. 5 Dowl. & Ryl. 82; *Fennell v. Ridler*, 5 Barn. & Cres. 406; s. c. 8 Dowl. & Ryl. 204; *Myers v. State*, 1 Conn. R. 502.

⁴ See *Goss v. Whitney*, 24 Verm. 187; *Lovejoy v. Whipple*, 18 Verm. 379.

⁵ *Bloxsome v. Williams*, 3 Barn. & Cres. 232; *Lovejoy v. Whipple*, 18 Verm. 379; *Fennell v. Ridler*, 8 Dowl. & Ryl. 204; s. c. 5 Barn. & Cres. 406; *Williams v. Paul*, 6 Bing. R. 653.

on Sunday, and all the terms agreed upon, it would be doubtful, whether the mere deferring of the signature thereto until Monday, would render it valid.¹ But any ratification of the contract on a weekday, such as a new promise to pay, a refusal to rescind the contract on demand made, — a partial payment, and the like, — would render the contract binding though originally made on Sunday.²

§ 620. There has been a distinction lately drawn between cases, where a contract violates a statute law designed for the protection of the public, and where it violates a statute law, which is merely designed for the protection of the revenue. And it has been held, that where there was a mere breach of a revenue regulation, which was protected by a specific penalty, and there was no fraud upon the revenue, and no clause in the statute, making the contract illegal, that it was valid, and only subjected the party to the payment of the penalty.³ But this distinction has not found favor, and seems now to be abrogated, and the true rule seems to be, as laid down by Baron Parke, that “notwithstanding some *dicta* apparently to the contrary, if the contract be rendered illegal, it can make no difference in point of law, whether the statute, which has made it so, has in view the protection of the revenue, or any other object.”⁴

§ 621. There is another distinction to be observed between cases where the contract is directly in violation of a statute, and cases where it is collaterally connected with some incidental illegality not contemplated in its terms. If the

¹ *Smith v. Sparrow*, 4 Bing. R. 87.

² See *Sumner v. Jones*, 24 Verm. 317; *Adams v. Gay*, 19 Verm. 358; *Sargeant v. Butts*, 21 Verm. 99.

³ *Johnson v. Hudson*, 11 East, R. 180; *Brown v. Duncan*, 10 Barn. & Cres. 98; *Hodgson v. Temple*, 5 Taunt. R. 181.

⁴ *Cope v. Rowlands*, 2 Mees. & W. 157. See also, *Story's Conflict of Laws*, § 259, note; *Pellecat v. Angell*, 2 Cro. Mees. & Rosc. 311.

illegality do not form a portion of the contract, but be entirely collateral, and capable of complete separation therefrom, it will be binding. But if the illegality be inherent, so that it constitutes a portion of the consideration, the contract will be void.¹ Thus, where a person sold tobacco, without previously complying with the statute regulations as to obtaining a license, it was held that he could sue the vendee for the price, since the contract of sale was wholly independent and collateral to the illegality.² So, also, where a rectifier of spirits had sold spirits without having previously conformed to the provisions of the excise act, requiring him to send with them a permit stating their true strength,—it was held that he could recover the price thereof; for there was no illegality in the mere contract of sale, but only in the subsequent omission of the vendor to send a proper permit.³

¹ *Wetherell v. Jones*, 3 Barn. & Adolph. 221; *Pellecat v. Angell*, 2 Cro. Mees. & Rose. 311; *Rex v. Inhab. of Somerby*, 9 Adolph. & Ell. 311; *Fergusson v. Norman*, 5 Bing. N. C. 76; *Forster v. Taylor*, 5 Barn. & Adolph. 889; *Little v. Poole*, 9 Barn. & Cress. 200. See also *Story's Conflict of Laws*, § 247 to 255.

² *Johnson v. Hudson*, 11 East, R. 180.

³ *Wetherell v. Jones*, 3 Barn. & Adolph. 221. In this case Lord Tenterden said: "We are of opinion that the irregularity of the permit, though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract which is in itself perfectly legal; there having been no agreement, express or implied, in that contract, that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part." In *Fergusson v. Norman*, 5 Bing. N. C. 84, Mr. Justice Tindal said, "A distinction may easily be drawn as to those duties imposed on the pawnbroker which are entirely collateral to the individual contract;

§ 622. So, also, if an act, in violation of either statute or common law, be already committed, and a subsequent agreement entered into, which, though founded thereupon, constituted no part of the original inducement or consideration of the illegal act, such an agreement is valid.¹ If, therefore, goods, which have been smuggled, be sold to a third person, he knowing the fact, yet, unless the sale be in pursuance of an original agreement, entered into before the smuggling, and forming an inducement thereto, the vendee will be liable for the price.² So, also, if A. should, during war, contrive an illegal plan for importing goods from the country of the enemy, on his own account, and goods should be sent to B. in the same vessel, and A. should, at the request of B., become surety for the payment of duties on B.'s goods, — or should assume the responsibility of the expenses, which might be incurred on account of a prosecution for illegal importation, — or should advance money to B. to enable him to pay those expenses, — A. might maintain an action upon the promise of B. to refund the money; because if the act constituted no part of the original scheme, the contract would be founded upon a new and legal consideration, unconnected with the original act, although remotely caused by it. Yet if the importation had been the result of a scheme between the plaintiff and defendant, a bond given to repay any advances, made in pur-

and it would be too much to say, because he had not observed the enactment of the statute in such matters, that therefore the contract made by him should be void. Suppose an instance in which his name was required to be put up over the door, and some mistake had been made. A penalty is given for not putting up the name; but it would not follow that contracts entered into by an individual whose name had been incorrectly spelled, would be therefore void."

¹ *Armstrong v. Toler*, 11 Wheat. 258, 271, 276; *The George, The Bothnea*, and the *Janstaff*, 1 Wheat. 408; *The George*, 2 Wheat. 278; *Tenant v. Elliott*, 1 Bos. & Pul. 3; *Farmer v. Russell*, 1 Bos. & Pul. 295; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Filson v. Himes*, 5 Barr. R. 452.

² *Armstrong v. Toler*, 11 Wheat. 271, 276.

suance of such an agreement, would be void.¹ Indeed, wherever the original illegal contract is so involved in the contract on which the action is brought, that the two cannot be separated, — and whenever they seem to be but a continuation of the same agreement, — no action can be supported on either. But if the subsequent agreement be totally disconnected from the original, it may be enforced.² This distinction will be found to form the principle, which lies at the root of many apparently contradictory cases, and to offer the best solution to the various and opposing decisions.

§ 623. There seems also to be a distinction between cases where the statute is merely directory in its terms, and the terms, which are not complied with, are only collaterally connected with the contract, and cases where the statute is directly prohibitory, and its requisitions are conditions precedent, directly affecting the contract. And in the former case, it would seem, that the contract was merely voidable, and not void.³ Thus, although an assignment of a patent, or a deed, is required by statute to be recorded, yet as this requisition is merely directory, and for the purpose of giving notice to *bonâ fide* purchasers for a valuable consideration, it does not render the assignment void.⁴

§ 624. Again, wherever goods are sold, or money lent, for

¹ *Armstrong v. Toler*, 11 Wheat. 258.

² *Tenant v. Elliott*, 1 Bos. & Pul. 3; *Farmer v. Russell*, 1 Bos. & Pul. 296; *Simpson v. Bloss*, 7 Taunt. R. 246; *Petrie v. Hannay*, 3 T.R. 418; *Aubert v. Maze*, 2 Bos. & Pul. 371; *Gas Light Co. v. Turner*, 5 Bing. N. C. 666; s. c. in error, 6 Bing. N. C. 324; *Story on Sales*, § 508. See, also, *Phalen v. Clark*, 19 Conn. R. 421; *Bridges v. Fisher*, 25 Eng. Law and Eq. R. 210.

³ *Fergusson v. Norman*, 5 Bing. N. C. 84; *Cope v. Rowlands*, 2 Mees. & Welsb. 149; *Little v. Poole*, 9 Barn. & Cres. 192; *Warren v. Manuf. Ins. Co.* 13 Pick. R. 518; *Ward v. Wood*, 13 Mass. R. 539; *The Brig Draco*, 2 Sumner, R. 157; *Brooks v. Byam*, 2 Story, R. 542; *Johnson v. Hudson*, 11 East, R. 180.

⁴ *Brooks v. Byam*, 2 Story, R. 542.

the express purpose of enabling a party to violate either the statute or the common law, an action cannot be maintained on the sale or loan.¹ Thus, where a person sold goods, in order that they might be exported to a place, exportation to which was forbidden by statute, and a bond was given for the price, it was held, that the vendor could not recover in an action on the bond.² So, also, where a vendor knowingly sold certain drugs to a brewer, to be used in his brewery, contrary to the provisions of a certain statute, it was held, that he could not recover the price, although it did not appear that the drugs were actually used in the brewery.³ The same rule also applies to spirituous liquors sold contrary to law;⁴ to money lent for the purpose of settling illegal stockjobbing transactions,⁵ or of ransoming a ship contrary to statute 45 George III.;⁶ and to money paid on the loss of an illegal wager.⁷ But the mere fact, that the seller knows that goods sold will be applied to an illegal purpose, will not, of itself, be ordinarily sufficient to deprive him of his right of payment therefor; but he must, in some manner, be implicated in the transaction and privy thereto.⁸ And the test is, as has been said, whether the con-

¹ See ante, § 202; *White v. Buss*, 3 Cush. R. 448; *Ex parte Bell*, 1 Maule & Selw. 751; *Lightfoot v. Tenant*, 1 Bos. & Pul. 551; *Langton v. Hughes*, 1 Maule & Selw. 596, 597; *Story on Conflict of Laws*, § 246, &c.; *Craig v. The State of Missouri*, 4 Peters, 410; *S. P. 6 Hammond*, 444. But see *Ex parte Bulmer*, 13 Ves. Jr. 313; and *Hodgson v. Temple*, 1 Marsh. 5; *s. c.* 5 Taunt. R. 181; *Executors of Cambioso v. Assignees of Maffett*, 2 Wash. C. C. R. 98.

² *Lightfoot v. Tenant*, 1 Bos. & Pul. 551. See *Parkin v. Dick*, 2 Camp. 221; 11 East, 502; *Holman v. Johnson*, Cowp. R. 341; *Billard v. Hayden*, 2 Car. & Payne, 472.

³ *Langton v. Hughes*, 1 Maule & Selw. 593.

⁴ *Briggs v. Campbell*, 25 Verm. R. 704.

⁵ *Cannan v. Bryce*, 3 Barn. & Ald. 179, which finally decided this long-mooted question, in respect of this transaction. *Steers v. Lashley*, 6 T. R. 61.

⁶ *Webb v. Brooke*, 3 Taunt. R. 6.

⁷ *Clayton v. Dilly*, 4 Taunt. R. 165; *Simpson v. Bloss*, 2 Marsh. 542; *s. c.* 7 Taunt. R. 246.

⁸ *Holman v. Johnson*, Cowp. R. 341; *Clarke v. Shee*, Cowp. R. 197; *s. c.*

tract on which the claim is founded can or not be wholly disconnected from the illegal transaction, or whether it was in furtherance thereof.¹ Thus, where lottery tickets were sold in a State where the sale was lawful, to a citizen of another State where the sale was prohibited by statute, the contract was enforced, although the seller knew that the buyer intended to resell them in violation of the statute, the two transactions being completely separable and independent.² But whenever goods have been sold for the express purpose of enabling a party to violate a statute, the contract has been held to be void.³

§ 625. An illustration of this doctrine will be found in cases where goods are sold to be *smuggled*, where the rule is, that if the vendor do any act in furtherance of the smuggling,—or if he assume any risk for the importation,—or be implicated in the illegality,—the contract will be void.⁴ Thus, if he pack them in a particular manner, by the order of the buyer, with the knowledge that they are to be smuggled, and for the purpose of affording facility for smuggling,⁵—or if he agree

2 Doug. R. 698, n.; Pellecat v. Angell, 2 Crompt. Mees. & Rosc. 311; Waymell v. Read, 5 T. R. 599. See also Brown on Sales, § 185, 186.

¹ Simpson v. Bloss, 7 Taunt. R. 246; s. c. 2 Marsh. R. 542; Petrie v. Hanay, 3 T. R. 418; Aubert v. Maze, 2 Bos. & Pul. 371; Farmer v. Russell, 1 Bos. & Pul. 295; Tenant v. Elliott, 1 Bos. & Pul. 3; Armstrong v. Toler, 11 Wheat. R. 271.

² M'Intyre v. Parks, 3 Metcalf, R. 207.

³ Gas Light Co. v. Turner, 5 Bing. N. C. 666; s. c. In Error, 6 Bing. N. C. 324; Langton v. Hughes, 1 Maule & Selw. 593; Cannan v. Bryce, 3 Barn. & Ald. 179.

⁴ Armstrong v. Toler, 11 Wheat. 279. See Brown on Sales, § 189, 190, 191; Holman v. Johnson, Cowp. R. 341; Clarke v. Shee, Cowp. R. 197; s. c. 2 Doug. R. 698, n.; Waymell v. Read, 5 T. R. 599; Bernard v. Reed, 1 Esp. R. 91; Biggs v. Lawrence, 3 T. R. 454; Clugas v. Penaluna, 4 T. R. 466; Pellecat v. Angell, 2 Crompt. Mees. & Rosc. 311; Catlin v. Bell, 4 Camp. R. 183; Brown on Sales, § 187, 188.

Waymell v. Read, 5 T. R. 599; Bernard v. Reed, 1 Esp. R. 91; Biggs v. Lawrence, 3 T. R. 454; Clugas v. Penaluna, 4 T. R. 466.

to deliver them at their place of destination, so that the contract is not complete before the smuggling,¹ — the contract is wholly void. But the mere fact of knowledge that they are to be smuggled afterwards would not alone invalidate the sale, if the contract were completed before the goods were smuggled, and if the vendor do no act to assist the vendee, or further his illegal plans.²

§ 626. Again, where goods are prohibited from importation, the same rule applies. If the vendor connive at, or assist the importation, the contract is void. Thus, if the vendor should make out false invoices of goods, to enable the vendee to import them, — or should, after receiving a bill of exchange for the price, state the goods in the invoice at a lower and false price, to enable the vendee to avoid paying the legal duty, — in both cases he could not recover.³

¹ *Clarke v. Shee*, Cowp. R. 197; s. c. 2 Doug. R. 698, n. ●

² *Holman v. Johnson*, Cowp. R. 341; *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 311; s. c. 1 Gale, R. 187; *Brown on Sales*, § 182. The same rule obtains in the law of Scotland. *Walker v. Falconer*, 27 Feb. 1757; *More v. Steven*, 13 Nov. 1765; *Attorney of Cullen v. Philp*, 15 May, 1793.

³ *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 311; s. c. 1 Gale, R. 187; 5 Tyrw. R. 945. Professor Bell, in his *Treatise on the Contract of Sale*, p. 22, 23, says: "The result of all the cases on this subject [smuggling] seems to be, (1.) That no contract for importing or exporting goods in order to defeat the revenue laws can be enforced, whether the person so acting be a native or a foreigner. (2.) That the mere sale by a merchant abroad, whether a native of this country or a foreigner, of goods which the buyer afterwards smuggles into this country, is not illegal, nor is an action denied upon the contract to the seller. (3.) That every one participant in the attempt to evade the revenue laws, by furnishing the means of facilitating the intention to smuggle, is to be held a party to the illegal contract, and action is denied to him. (4.) That, in the balancing of evidence, the circumstance of the seller being a native, gives a bias against him. (5.) That, on a sale of goods prohibited to be imported, or known to be smuggled, action will not be sustained for the price on the one hand, or for the delivery of the goods on the other. (6.) That the purchase in *bonâ fide* of goods not prohibited, but which have been smuggled, is effectual."

§ 627. We have already seen, that wherever there are two considerations to a promise, if either of them be unlawful, the promise is void, but if one of them be only void, the other will support a promise.¹ But where the contract is to do two or more acts for a sufficient and legal consideration, and one of them is void, and capable of separation from the other acts, the contract is binding, in relation to the lawful acts, and void as to the remainder. The reason of this distinction is, that, inasmuch as the entire consideration forms the basis of every portion of the promise, — in the one case, if a part of the consideration be illegal, it vitiates the whole; while, if a part be merely void, it has no legal effect, being mere surplusage. Where, therefore, the contract is severable, and there are different acts to be done, some of which are void, and others binding, the agreement may be treated as if it were composed of several distinct contracts, with the same consideration, and enforced as far as it is lawful, and rejected as to the residue.² Thus, if the condition of a bond consist of several distinct parts, some of which are void, and some good, it is void only for the insufficient part, and good for the rest. So, also, if a bond be given for the performance of covenants, contained in a separate instrument, some of which are lawful, and others unlawful, the same rule prevails.³ This doctrine is equally applicable to contracts not under seal. Where, however, the binding part of a promise cannot be separated from the void part, as would be the case if the contract were an entirety, the whole is void.⁴ If, therefore, any

¹ Ante, § 460; *Deering v. Chapman*, 22 Maine R. 488.

² *Ley*, 79; *Mayfield v. Wadsley*, 3 Barn. & Cres. 361; s. c. 5 Dowl. & Ryl. 228; *Kerrison v. Cole*, 8 East, 236; *Collins v. Blantern*, 2 Wils. 351; *Mouys v. Leake*, 8 T. R. 411; *Van Dyck v. Van Beuren*, 1 Johns. 362; *Green v. Price*, 13 Mees. & Welsb. 693; *Frazier v. Thompson*, 2 Watts & Serg. 235.

³ *Chamberlaine v. Goldsmith*, 2 Brownl. 281; *Norton v. Syms*, Moore, 856; *Kerrison v. Cole*, 8 East, R. 236; *Mayfield v. Wadsley*, 3 Barn. & Cres. 361.

⁴ *Frazier v. Thompson*, 2 Watts & Serg. 235; *Woodruff v. Hinman*, 11 Verm. R. 592.

part of the entire consideration for a promise, or any part of the promise itself, incapable of separation from the rest, be void, the whole agreement is void.¹

§ 628. This doctrine has always been admitted in cases, where a part of the promise is void to the common law; but where a part of the promise is rendered void by the provisions of a statute, the whole contract was formerly held to be void. The dictum on which this rule was founded, and which has been so often repeated in the books, is ascribed to Lord Hobart, and is as follows: "The statute is like a tyrant; where he comes, he makes all void. But the common law is like a nursing father; it makes only void that part, where the fault is, and preserves the rest."² This, however, so far from being a general dictum, applying to all agreements in contravention of any statute, was apparently limited to *the* statute of 23 Henry VI. then under consideration, which prescribes the form of obligation, that an officer shall take from the person arrested, and expressly makes "any obligation, in other form, void."

§ 629. The modern cases, however, have entirely abrogated this distinction between contracts which are void by the common law, and those which are rendered void by statute regulations; and the same rule is held to be applicable to both cases, namely, — that wherever the contract is to perform binding and void acts, and they can be separated, it will be valid in respect to such acts as are not void, whether the other part be void by statute, or at the common law; provided, however, that if it be contrary to a statute, the whole of a contract be not rendered void by the express or implied pro-

¹ Featherston *v.* Hutchinson, Cro. Eliz. 199.

² Lord Hobart, in Norton *v.* Simmes, Hobart, 14; Plowd. 68; 1 Brownl. 64; Moore, 856; Meleveror *v.* Redshaw, 1 Moor. 35. See also Sheppard's Touchstone, 374.

visions of the statute;¹ as in the case of 23 Henry VI., in relation to bonds illegally taken by the sheriff. Thus, where a conveyance of an advowson, including the next presentation, was made for an entire sum, it was held to be good in respect to the advowson, and void as to the next presentation, for simony, which is prohibited by statute.² So, also, there are several analogous cases, where certain provisions in a deed were in violation of the property tax act of 46 George III. and the mortmain act of 9 George II. c. 36.³

§ 630. This rule applies to cases where part of an agreement is void by the statute of frauds. If the part of the contract which is rendered void by the statute be so connected with the part which is valid, that the two cannot be separated, the whole is void. If they can be separated, the contract is valid, *pro tanto*.⁴ Thus, where a woman, upon the death of her husband, in consideration of being allowed to continue in the occupation of premises leased to him, promised, orally, to pay the rent which was already due, and, also, the rent which

¹ *Mouys v. Leake*, 8 T. R. 411; *Kerrison v. Cole*, 8 East, 231; *Doe v. Pitcher*, 6 Taunt. 359; *Greenwood v. Bishop of London*, 5 Taunt. 727; *Newman v. Newman*, 4 M. & S. 66; *Wigg v. Shuttleworth*, 13 East, 87; *Gaskell v. King*, 11 East, 165; *Howe v. Synge*, 15 East, 440; *Tinckler v. Prentice*, 4 Taunt. 549; *Fuller v. Abbott*, 4 Taunt. 105; *Readshaw v. Balders*, 4 Taunt. 57; *Bac. Abr. Covenant, G, Officers, F*; *Ellis on Debtor & Creditor*, p. 377, note *o*.

² *Greenwood v. Bishop of London*, 5 Taunt. 727; *S. P. Newman v. Newman*, 4 Maule & Selw. 66.

³ *Wigg v. Shuttleworth*, 13 East, 87; *Gaskell v. King*, 11 East, 165; *Howe v. Synge*, 15 East, 440; *Tinckler v. Prentice*, 4 Taunt. 549; *Fuller v. Abbott*, 4 Taunt. 105; *Readshaw v. Balders*, 4 Taunt. 57.

⁴ *Lexington v. Clarke*, 2 Vent. 223; *Cooke v. Tombs*, 2 Anst. 420. See *Roberts on Frauds*, 111, note (53); *Lea v. Barber*, 2 Anst. 425, note; *Chater v. Beckett*, 7 T. R. 201; *S. P. 10 Barn. & Cresw. 664*. See, also, *Crawford v. Morrell*, 8 Johns. 253; and *Mayfield v. Wadsley*, 3 Barn. & Cresw. 361; *s. c.* 5 Dowl. & Ry. 228; *Wood v. Benson*, 2 Crompt. & Jer. 94.

should subsequently accrue during the term of her occupation, it was held, that the agreement was entire, and that, although the promise, as to one part, was void, by the statute of frauds, it was, nevertheless, good as to the other part.¹ So, where there was a verbal contract to sell a certain farm and dead stock, and growing wheat, at separate prices, it was held, that the contracts were distinct, and although the agreement as to the land was void, by the statute of frauds, because it was oral, yet the agreement as to the wheat and dead stock was binding.²

§ 630 *a.* We have already seen that when a contract is made to do an act prohibited by statute, no action can be maintained to enforce performance, or to obtain damages for a breach thereof. Nor if the claim be really founded on the contract, will an action on the case for damages be supported.³ But where a prohibited contract is made for the hire, use, or conveyance of property, or for services of any kind relating thereto, and the property is accordingly surrendered by the owner, although he could bring no action on the contract to recover the price, yet if the bailee wrongfully use or appropriate the property, and transcending his rights and powers under the contract, destroy or injure it, it seems that he would be liable in an action on the case for damages. But in such a case the injury should be susceptible of complete separation from the contract, for if the claim grow out of the contract it will not be good.⁴ Thus if a carrier of the mail should, contrary to the law of the United

¹ *Lexington v. Clarke*, 2 Vent. 223.

² *Mayfield v. Wadsley*, 3 Barn. & Cresw. 361; s. c. 5 Dowl. & Ry. 228. See, also, *Wood v. Benson*, 2 Crompt. & Jerv. 94.

³ *Gregg v. Wyman*, 4 Cushing, R. 322; *Simpson v. Bloss*, 7 Taunt. R. 246; *Fivaz v. Nicholls*, 2 Man. Grang. & Scott, 501; *Phalen v. Clark*, 19 Conn. R. 421; *Jennings v. Rundall*, 8 T. R. 335; *Fitts v. Hall*, 9 New Hamp. R. 441; *Woodman v. Hubbard*, 5 Foster, N. Hamp. R. 67.

⁴ *Lewis v. Littlefield*, 15 Maine R. 233; *Phalen v. Clark*, 19 Conn. R. 421; *Gregg v. Wyman*, 4 Cushing, R. 322; *Dwight v. Brewster*, 1 Pick. R. 51; *Frost v. Hull*, 4 New Hamp. R. 153.

States, undertake to carry and deliver a packet of bank-notes to the person to whom it is addressed, no action could be maintained for the non-carriage according to the contract; but if the carrier should refuse to redeliver the packet to the owner, he would be liable therefor in an action of trover.¹ But although the rule is well settled, that where the plaintiff cannot support his demand without relying on an unlawful agreement, he cannot recover,² yet it is sometimes very difficult of application, and in two cases which have recently occurred in this country, it has been differently applied to similar facts. The question in these cases was whether, if a person in violation of the statute let his horse on Sunday, to be driven to one place, and the hirer drove him beyond that place to another, so as to injure or kill the horse, the owner could main-

¹ *Dwight v. Brewster*, 1 Pick. R. 51. Parker, C. J., said in this case: "The principal ground of defence to the action was, that by the law of the United States, it was made unlawful for a carrier of the mail to take any letter or packet, and deliver it to the person to whom it was sent, and that such mail carrier was made liable to a penalty for so doing; that if it was unlawful to carry, it must be unlawful to send, and that no action could be maintained for the non-performance of an undertaking that constituted an offence. That no action will lie for damages for not performing an unlawful contract, has been settled by this court in several actions heretofore. The cases of *Springfield Bank v. Merrick*, 14 Mass. Rep. 322; *Russell v. De Grand*, 15 Mass. Rep. 35, and *Wheeler v. Russell*, 17 Mass. Rep. 258, establish this principle, and the English cases are full to this point. The principle settled is, that a party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract, who becomes possessed of the property of the other party, with which he is to do something which the law prohibits, can acquire a right to that property. The contract being void, the property is not changed, if it remains in the hands of him to whom it is committed. If he has executed the contract with it, or it has become forfeited by judicial process, or if stolen or lost without his fault, he may defend himself against any demand of the owner in ordinary cases; but if he has it in his possession, he must be liable for the value of it; so that in an action of trover, with proper evidence of a conversion, the plaintiff would undoubtedly prevail."

² *Phalen v. Clark*, 19 Conn. R. 421.

tain trover for the conversion of the animal. The supreme court of Massachusetts in an able and elaborate judgment,¹ held that trover was not maintainable, on the ground that the claim of the plaintiff, although in form for a tort, was in substance to recover damages for a breach of contract; and also because the plaintiff could not prove his case, without showing the illegal contract by which the defendant obtained possession of the horse, so that the conversion of the horse was merely a breach of the contract not to drive him beyond a particular place. On the other hand, the superior court of New Hampshire,² in an equally able and carefully reasoned

¹ *Gregg v. Wyman*, 4 Cushing, R. 322.

² *Woodman v. Hubbard*, 3 Foster, N. Hamp. R. 67. Paley, J., said: "If the owner places his property in the hands of another to be used temporarily for an unlawful purpose, or in any unlawful way, though the contract which he makes respecting the illegal use is void, he does not forfeit his property in the thing which he has thus delivered to another on an illegal contract. Where the property is intrusted to another to be wholly devoted and appropriated to an illegal purpose, perhaps the law is different; as in the case where goods are shipped to be carried to the public enemy. . . . The property in the horse remained, therefore, in the plaintiff; and it would seem to follow as a necessary conclusion that for a direct, substantial invasion of that right, he might maintain the proper action against the defendant or a third person. In such an action he would not claim by or through the illegal contract, but would claim, as the general owner of the horse, for an injury done to his right of property, which was antecedent to the contract, and not derived from it, nor defeated by it.

"The action of trover is founded upon property in the plaintiff, and a conversion by the defendant. A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property. If one hire a horse to be driven to one place, and voluntarily drive him to another, it is a conversion, and trover will lie. *Wheelock v. Wheelwright*, 5 Mass. 104.

"This is in accordance with the law in other cases, where the bailee for one purpose diverts the thing bailed to another; as where a carrier uses, or sells, or delivers to the wrong party, the commodity which he received to transport. The circumstance that the property is in the hands of the bailee, with the license of the owner to use it for one purpose, gives no right to use it for another; and the invasion of the owner's right of property is as complete, when the bailee goes beyond his license and duty, as if the control over the

judgment, held that the owner could maintain trover for the conversion, on the ground that the driving of the horse beyond

property were usurped without any bailment. There can be no doubt, on the authorities, that trover would be a proper remedy in this case, if the illegality of the contract, on which the defendant took the horse into his possession, had not been set up as a defence.

"If, however, though there has been in the case a technical legal conversion, the real and substantial claim of the plaintiff is merely to recover damages for the breach of an illegal contract; if he must, notwithstanding the form of his action, claim in fact by and through his contract, he cannot evade the consequences of his illegal act by adopting a fictitious action, allowed in ordinary cases for the purposes of the remedy. In some cases the plaintiff, for convenience of his remedy, when his claim arises under a contract, is allowed to allege his gravamen in a criminal neglect of duty in the manner of performing, or in neglecting to perform, the contract. *Govett v. Raduidge*, 3 East, 62. But in such case, by varying the form of the remedy, the plaintiff cannot deprive his adversary of any defence such as infancy, which he might have set up, if the claim had been made for a breach of the contract. *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marshall, 485, (4 C. L. 375); *Fitts v. Hall*, 9 N. H. Rep. 441.

"The question, then, becomes material whether the only real injury which the plaintiff suffered was by a breach of the contract; or whether the driving of the horse to another place was a substantial invasion of the plaintiff's right of property.

"When the defendant voluntarily drove the horse beyond the limits for which he was hired, he acted wholly without right. He then took the horse into his own control, without any authority or license from the owner. The conversion was in law as complete, the wrongful invasion of the plaintiff's right of property was as absolute as if, instead of driving the horse a few miles beyond the place for which he had hired him, he had detained and used him for a year, or any other indefinite time, or had driven him to market and sold him. If taking the wrongful control of the horse, and driving him ten miles, was not a substantial conversion, how far must the defendant have driven him? how long must he have detained him? and what other and further wrongful acts was it necessary that he should do, in order to make himself a substantial and real wrongdoer? He would seem to be quite clear, that if the original act, assuming control over the horse, was not a substantial invasion of the plaintiff's right of property, no subsequent use or abuse of the horse by the defendant could make it so; and that if the defendant cannot on the facts of this case be charged for the conversion of the horse, he could not have been if he had sold or wilfully destroyed him. In other words, the

the agreed place, was a wrongful invasion of the plaintiff's right of property, having nothing to do with the contract,

plaintiff having delivered the horse into the defendant's hands on a contract that was illegal, but which nevertheless left the general property in the plaintiff, the defendant may do what he will with the horse, and the plaintiff can have no remedy, because whatever he does can be no more than a breach of his unlawful contract to return the horse. This does not appear to be a reasonable conclusion. The cases are not entirely unanimous as to what acts of a bailee, who receives good on a void or voidable contract, are sufficient to make him liable for a tortious conversion. The question has arisen most frequently where infancy has been set up as a defence. *Vasse v. Smith*, 6 Cranch, 231; *Campbell v. Stakes*, 2 Wendell, 137; *Mills v. Graham*, 4 Bos. & Pull. 140; *Homer v. Thwing*, 3 Pick. 492, are strong authorities to the point that an infant who receives goods on a contract, and disposes of the property without right, is liable in trover; and these cases are cited and approved by the learned chief justice in *Fitts v. Hall*, 9 N. H. Rep. 443; *Wilt v. Welsh*, 4 Watts, 1, and perhaps *Jennings v. Rundall*, 8 T. R. 336, must be regarded as somewhat in conflict with these cases. *Jennings v. Randall*, however, is criticized and doubted in *Fitts v. Hall*. *Homer v. Thwing*, 3 Pick. 492, maintains the position that in a case like this, driving the horse beyond the place for which he was hired, is a substantial conversion and a direct injury to the plaintiff's right of property, and not in substance a mere breach of the defendant's contract. In that case it was held that infancy was no defence to trover for such a conversion of a horse. If the action had been substantially upon the infant's voidable contract, he could not have been charged. We think the weight of authority and of argument are very decidedly in favor of the rule declared in *Homer v. Thwing*.

"From these premises the conclusion would seem to follow that trover may be maintained on the facts of this case. If the plaintiff made an illegal contract respecting the horse, that contract is void; but the illegal contract being for a temporary use of the horse, the consequences do not extend to a forfeiture of the plaintiff's general right of property; and for a wrongful invasion of that right he may maintain trover against the defendant, the bailee, or a third person. This is the doctrine of *Dwight v. Brewster*, 1 Pick. 51. In that case the contract was not only void but illegal.

"Driving the horse beyond the place for which he was hired is a wrongful invasion of the plaintiff's right of property, and a substantial conversion. In trover for such a conversion, the plaintiff's claim is neither in form nor in substance by, through, or under the illegal contract, and the invalidity and illegality of the contract are no defence to the suit. The contract is no link in the chain of the plaintiff's case; he shows the contract, which was invalid

and that if the mere fact that the plaintiff must show possession to have been obtained through an illegal contract,

and illegal; but notwithstanding the contract and in spite of it, his right of property remained. That right has been directly invaded by the defendant's wrongful act, and this action is the appropriate remedy. . . .

"One case of high authority we are obliged to regard as in conflict with the conclusion to which we have arrived, and that is the recent case of *Gregg v. Wyman*, 4 Cushing, 322, in the supreme court of Massachusetts. The able and elaborate judgment in that case, and the great respect due to all the decisions of that court, have caused the principal hesitation which we have felt in holding that the present action could be maintained.

"We understand the decision in *Gregg v. Wyman*, to be put, in the first place, upon the ground that the claim of the plaintiff, though in form for a tort, was in substance to recover damages for the breach of the illegal contract. This position does not appear to be very confidently maintained, and would seem to be entirely inconsistent with the case of *Homer v. Thwing*, 3 Pick. 492, decided in the same court. If the cases are to be regarded as in conflict, we prefer the rule of *Homer v. Thwing*.

"The other ground is that the plaintiff could not prove his case without showing the illegal contract by which the horse went into the defendant's hands; that he could not show the conversion of the horse by driving beyond the place for which he was hired, without showing the terms of the illegal contract; and, therefore, as he was obliged to show his own illegal act in making out his case, he cannot recover.

"Granting that in order to show the wrongful act of the defendant, upon which he relied, the plaintiff was obliged to prove that he had made an illegal and void contract, and violated the law, the question still recurs and remains, whether the consequences of his illegal act affect his right of property in the horse, and whether the defendant's act was a direct injury to that right, or only in substance a breach of the illegal contract. The general property remained in the plaintiff. That does not seem to be anywhere denied, and is the express doctrine of *Dwight v. Brewster*, and is necessarily involved in *Phalen v. Clark*, and *Lewis v. Littlefield*. It would not seem to follow as a legal or a logical consequence, that because the plaintiff had made an illegal contract respecting the horse, which still left the property in him, that though the illegal contract necessarily appeared in the plaintiff's proof of a direct and substantive injury to his property, no recovery could be had. The illegal contract appears in the case; the plaintiff has violated the law, and the contract is void. What then? The plaintiff's property in the horse still remains. Was the act of the defendant within the limits and scope of the contract, and a mere breach of it? If so, he is not liable. But if the act was not

was sufficient to prevent him from recovering for a tort beyond the limits and scope of that contract, then the plaintiff by like reasoning could not recover for any violation of his property thus obtained, even should it amount to a sale thereof.

covered by the contract, and done within it and under it, but was a direct, voluntary wrong to the plaintiff's right of property, he may recover. The reasoning of the court in *Gregg v. Wyman*, is quite conclusive to show that the plaintiff, having absolute power over his own property, and having delivered it to the defendant, the plaintiff can never show that the defendant has done any wrong to his right of property without showing the contract on which it was delivered. So, if the defendant should refuse to deliver the horse on demand, or should sell him or destroy him, it would in none of these cases appear that any wrong had been done to the plaintiff until he showed the contract, and that the act of the defendant was not under and within it. Whether the horse was delivered on a sale to the defendant, or on an agency to sell, would not appear without evidence of the contract. It necessarily follows from this view of the case, that a man is wholly without remedy for any injury that may be done to the horse he lets on Sunday, in violation of law, if the necessity of showing his illegal contract will preclude his recovery. Though the property is conceded to remain in the plaintiff, he has no remedy to enforce his right, because he cannot show it without showing the illegal contract of letting. And in all the numerous cases where horses are illegally let on Sunday, the hirer might with perfect impunity retain or sell them. This appears to us to be pushing the application of a well-settled principle to an unnecessary and extravagant length, not required nor warranted by the general current of the authorities. We are of opinion that the instructions of the court were correct, and that there must be judgment on the verdict."

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